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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. ———

WILLIAM "BILL" OTTO,
Petitioner,
v.
SAMUEL KOSOFSKY and ROBERT A. STITH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

Counsel on behalf of the Petitioner prays that a Writ of Certiorari issue to review the judgments of the Kentucky Court of Appeals entered in the above case on November 5, 1971.

OPINIONS BELOW

The opinion of the Circuit Court of Campbell County, Kentucky, a state court of general jurisdiction, is appended hereto as Appendix No. 1, but is not officially reported. The opinion of the Kentucky Court of Appeals, the highest court of the Commonwealth of Kentucky, is reported at 476 SW2d 626, Ky.

JURISDICTION

The judgments of the Kentucky High Court were made and entered on November 5, 1971, a copy of which is appended hereto as Appendix No. 2. On March 17, 1972, the Kentucky Court of Appeals entered an order denying petitioner's petition for rehearing, a copy of which is appended hereto as Appendix 8. Also, on March 17, 1972, an order was entered by the Kentucky Court of Appeals staying the execution and enforcement of its mandate for ninety (90) days to allow for petitioner to file for writ of certiorari. No bond was required. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3) in that Petitioner has been denied equal protection of the law under the United States Constitution, Article XIV, and because Section 226 of the Kentucky State Constitution as interpreted by the Kenucky Court of Appeals in the present case is repugnant to Article XIV of the Constitution of the United States.

QUESTIONS PRESENTED

Section 226 of the Kentucky Constitution forbids the holding of lotteries. Subsequent to the adoption of this constitutional provision, the Kentucky Legislature re-enacted a statute permitting horseracing and pari-mutuel pool betting. In 1931, the Kentucky Court of Appeals approved such a legislative exemption from the constitutional lottery prohibition on the grounds that an examination of the debates of the Kentucky Constitutional Convention of 1890 revealed that only the power of the State Legislature to grant special lottery licenses was forbidden by section 226 of the Kentucky Constitution (*Commonwealth* v. *Kentucky Jockey Club,* 238 Ky. 739, 38 SW2d 987), a copy of which is appended hereto as Appendix 10. In 1970, the Kentucky Legislature enacted a statute classifying Charity Bingo with pari-mutuel betting as exempt from section 226 of the Kentucky Constitution. In the present case, the Kentucky Court of Appeals has struck down the legislative classification of exemption on grounds that it violates Section 226 of the Kentucky Constitution and has forbidden the operation of charity bingo, while permitting the ongoing operation of a pari-mutuel betting. The questions presented are:

1.

WHETHER, CONSISTENT WITH THE EQUAL PROTECTION CLAUSE OF THE XIV AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, A STATE SUPREME COURT CAN, BY CONFLICTING INTERPRETATIONS OF A STATE CONSTITUTIONAL PROVISION, ALLOW A STATE LEGISLATURE TO CLASSIFY CERTAIN ACTS AS NOT VIOLATIVE OF THE STATE CONSTITUTION AND DENY THEM THE POWER TO DO THE SAME IN OTHER INSTANCES WHERE THERE IS NO REASONABLE DISTINCTIONS BETWEEN SUCH CLASSES, AND SUCH ACT CREATES A PRIVILEGED CLASS UNDER THE STATE CONSTITUTION.

2.

WHETHER, CONSISTENT WITH THE EQUAL PROTECTION CLAUSE OF THE XIV AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, A STATE COURT CAN NON-RETROACTIVELY APPLY A NEW RULE OF LAW, WHERE PREVIOUS CASES DECIDED CONCERN NOT A COMPLETE AND FINAL ACT, BUT AN ONGOING AND CONTINUING SERIES OF ACTS

UP TO, CONTEMPORANEOUS WITH AND CONTINUING FOR THE FORESEEABLE FUTURE BEYOND THE TIME OF OPERATION OF THE NEW RULE OF LAW, WHERE SUCH ACT CREATES AN ARBITRARY CLASS.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The XIV Amendment to the United States Constitution states in part:

SECTION I

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 226 of the Kentucky Constitution States:

> "Lotteries and gift enterprises forbidden.
>
> Lotteries and gift enterprises are forbidden and no privileges shall be granted for such purposes and none shall be exercised, and no schemes for similar purposes shall be allowed. The general assembly shall enforce this section by proper penalties. All lottery privileges or charities heretofore granted are revoked."

Kentucky Revised Statutes 436.230 (Hereinafter KRS) which exempts operating pari-mutuel betting from criminal sanction, states in part:

> "436.230 (1960; 1961) Operating gambling machine, game or contrivance; pools at race tracks and pinball machines exempted.

Any person who, with or without compensation, sets up, keeps, manages, operates or conducts or assists in setting up, keeping, managing, operating or conducting a keno bank, faro bank or other machine or contrivance used in betting whereby money or anything of value may be won or lost, or any person who, for compensation, percentage or commission, sets up, keeps, manages or operates or conducts a game of cards, oontz or craps whereby money or anything of value may be won or lost or with or without compensation, percentage or commission assists in setting up, carrying on, managing, operating or conducting any game so set up, carried on, managed, operated or conducted for compensation, percentage or commission, shall be fined five hundred dollars, and confined in the penitentiary for not less than one nor more than three years. In addition he shall be deemed infamous after conviction, and be forever disqualified from exercising the right of suffrage and from holding any state, county or city office of honor, trust or profit. The judgment of conviction shall recite such infamy and disqualification and shall not be valid without the recital. (166 c5 Eff. 6-16-66. 1950 c 145)

(2) Subsection (1) of this section shall not apply to persons who play at such games, machines or contrivances unless they aid or take other part in setting up, conducting, keeping, managing or operating them. (166 c5 Eff. 6-16-66. 1950 c 145)

(3) The change of the name of any of the games, bank tables, machines or contrivances prohibited by subsection (1) of this section shall not prevent the conviction of any person violating the provisions of that subsection.
(1966 c5 Eff. 6-16-66. 1950 c 145)

(4) *Subsection (1) of this section shall not apply to persons who sell combination or French pools on any regular race track during the races on that track.* An indictment for a violation of the provisions of subsection (1) of this section may charge the accused

in one count with any or all of the offenses mentioned or included in that subsection.
(1966 c5 Eff. 6-16-66. 1950 c 145) (Emphasis added.)

Baldwin's Kentucky Revised Statutes, Title XL p. 93, KRS Chapter 230, Title XIX pp. 20-27, dealing with Horse Racing, KRS 238, Baldwin's Current Services pp. 69-77, dealing with Charity Bingo and KRS 436.360 to 436.490, Baldwin's Title XL pp. 97-100, dealing with lotteries and exempting pari-mutuel betting from criminal sanctions, are appended hereto as Appendix 3, Appendix 4, and Appendix 5.

STATEMENT OF CASE

The "Bingo Licensing Act", hereinafter referred to as the Act, was enacted as Chapter 60 of the Acts of the General Assembly of the Commonwealth of Kentucky, 1970, and is now codified as Chapter 238 of the Kentucky Revised Statutes.

The Act provides that cities in counties having a population of 75,000 or more persons may license certain civic, charitable, fraternal, religious and veterans organizations to operate bingo games with the net proceeds of the game to be donated to educational, charitable, patriotic or religious uses.

Bingo is defined in the Act as a game played for prizes with cards bearing numbers or other designations, five or more in one line, the holder covering numbers as objects similarly numbered are drawn from a receptacle and the game being won by the person or persons who first cover a previously designated arrangement of numbers on such a card, and wherein the cards or tickets or rights to participate in such games are made strictly on a voluntary donative basis and no cash payment or other consideration is required as a prerequisite to participate. The Act further provides that it shall remain inoperative unless or until it is adopted by the legal voters of any city to which it is applicable.

The city council of the city of Newport, Kentucky (a city within a county containing more than 75,000 persons), passed a resolution calling a special election to obtain the sense of the voters concerning the adoption of the Act. Respondent, Kosofsky, instituted this action as a citizen and taxpayer seeking to have the Act declared invalid and seeking an injunction to prohibit the city of Newport from expending public funds in the conduct of the special election. The County Court Clerk of Campbell County, the members of the Election Commission and the City of Newport were named Defendants.

The Petitioner, Otto, was permitted to intervene on behalf of a class of persons interested in legalized bingo on the ground that the named defendants would not adequately represent the position of intervener. Petitioner, Otto, denied the allegations of the complaint and asked for a declaration of the validity of Chapter 238 of the Kentucky Revised Statutes. The court declined to enjoin the election, but required the intervener, Otto, to post a $6,000.00 bond to guarantee payment of the costs of the election. The election was held and its costs were defrayed from the bond posted by Otto. The voters adopted the provisions of the Act.

After the adoption of the Act by the voters, Respondent, Kosofsky, amended his complaint and Respondent, Stith, was permitted to file an intervening complaint in which it was alleged that any expenditure of city funds in the administration of licensing bingo would constitute illegal expenditure.

The Respondents claimed the Act violates the provisions of Sections 3, 59, 60 and 226 of the Kentucky Constitution and asked that the statute be struck down under those provisions and under the XIV Amendment to the United States Constitution. The trial court upheld the appellees' contention with respect to Section 226 of the Constitution and did not pass upon the other alleged constitutional objections.

Judgment was entered which declared the Act unconstitutional, enjoined expenditure by the city of public funds in administering the Act, invalidated any licenses which had been issued prior to the judgment and enjoined the Commissioner of Revenue from promulgating regulations pursuant to the authority of the Act.

The City of Newport filed an appeal of the lower Court's decision and presented to the Kentucky Court of Appeals a question of law as to whether KRS Chapter 238, violated Kentucky Constitution §§ 3, 15, 51, 59, 60 and 226 and the 14th Amendment to the Constitution of the United States.

William "Bill" Otto also filed an appeal adding an attack on Kosofsky and Stith's standing to sue, contending that the controversy was, in fact, moot, and extending Newport's argument that KRS Chapter 238 was valid under Kentucky Constitution § 226.

The Court of Appeals dismissed the question of standing and mootness as untimely, and limiting itself to the grounds given by the lower court of violation of Kentucky Constitution § 226, sustained the lower Court.

Petitioner then filed a petition for re-hearing, pointing out to the Court that its decision violated the doctrine of stare decisis and reiterating and expanding its arguments that the Court of Appeal's action denied Petitioner equal protection of the law as guaranteed by the XIV Amendment of the United States Constitution.

The Kentucky Court of Appeals denied the petition for re-hearing without comment.

RAISING OF THE FEDERAL ISSUE

The first mention of the XIV amendment of the United States Constitution came by the respondents in Item IV of their prayer for relief in their Complaint filed in the Campbell Circuit Court, July 10, 1970. The original complaint was filed against the City of Newport, whose resolution initiated the plebiscite process, and against the county election officials, who would conduct the election.

The answers to this complaint were at best perfunctory and certainly not substantive. The County Officials answered ". . . That none of these answering Defendants have any personal interest in the outcome of said election and are undertaking to conduct said election only in their official capacity and pursuant to law . . . that these answering Defendants seek direction from the Court as to whether such an election shall be held . . . ."

The City of Newport's total answer consisted of:

> "ANSWER OF CITY OF NEWPORT
> (Filed July 21, 1970)
>
> Defendant, City of Newport, for answer to the Complaint admits the allegations thereof in respect to facts alleged but denies the legal effect of same.
>
> WHEREFORE this answering defendant prays the judgment of the Court upon all issues of law presented by the pleadings and that upon determination thereof the Complaint be dismissed at Plaintiff's cost.
>
> /s/ Lawrence Riedinger, Jr.
> Attorney for City of Newport
> Court House
> Newport, Kentucky 41071"

Desiring a vigorous defense of the statute's constitutionality, a number of charitable organizations met and through William "Bill" Otto, the Petitioner, intervened in the case.

Copies of their motion and the Order granting the motion are hereto appended as Appendix 6 and Appendix 7.

Petitioner in his prayer for relief prayed the Court to sustain KRS Chapter 238 under the Kentucky Constitution and the XIV Amendment to the Constitution of the United States. In the course of the proceedings, respondent amended his original complaint and respondent Stith intervened as a Plaintiff.

The decision of the lower court was based solely on the point that KRS Chapter 238 was violative of Kentucky Constitution § 226.

On appeal, the City of Newport took a non-advisary stance presenting the facts of the case, raising various points of law and concluding:

> "Appellant asks that the Court by its opinion upon this appeal from the declaratory judgment declare the validity or invalidity of KRS, Chap. 238 within the framework of Kentucky Constitution §§ 3, 15, 51, 59, 60, 226 and the Fourteenth Amendment to the Constitution of the United States of America."

Petitioner devoted the thrust of his argument to the validity of KRS Chapter 238 under Kentucky Constitution § 226 asserting that *Commonwealth* v. *Kentucky Jockey Club, et al.,* 238 Ky. 739, 38 SW2d 987 (1931), was the controlling law on this point in Kentucky. The appropriate portion of Petitioner's appeals' argument is appended to this Petition as Appendix 8.

The Kentucky Court of Appeals, however, chose to ignore this case which approved the legislative enactment permitting horseracing then and now. Making a feeble attempt to distinguish that case, the opinion in the current case stated:

> "Kentucky Jockey Club held pari-mutuel betting at race tracks to be a form of gambling not prohibited

> by Section 226 of the Constitution. In that case, the Court referred to the debates of the Constitutional Convention which adopted our present Constitution. In those debates, the question of whether pooling privileges at race tracks should be prohibited by the Constitution was discussed and the delegates clearly indicated intention that race track pooling was not to be prohibited by the Constitutional provisions against lotteries. In Kentucky Jockey Club, the Court gave effect to the intention expressed by the drafters of the Constitution."

It then went on to state:

> "The attempt to include bingo within this same principle must fail because there is nothing in our judicial or legislative history to support a construction that bingo is not a form of lottery or that it was not intended to be prohibited by Section 226 of the Constitution."

This is a clear misconstruction of the *Commonwealth* v. *Kentucky Jockey Club* case, *supra,* as the opinion in that case made it clear that it was based on a determination by the Court, that from an examination of the debates of the Kentucky Constitutional Convention of 1890, the Court held that § 226 of the Kentucky Constitution was meant to end the practice of the State Legislature granting private lottery licenses. The Court said in the *Kentucky Jockey* case, *supra,* p. 993:

> "For many years prior to the adoption of our present constitution, laws had existed for the prohibition of all lotteries, except those authorized by the legislature. Many special acts had been passed to authorize lotteries for various purposes. The Kentucky Digest (Volume 3, Page 5470) contains a citation of many cases decided by this Court upon various phases of this subject. The Constitution was framed to end that

> practice and to outlaw lotteries, and all schemes of that character. Commonwealth v. Douglass, 100 Ky. 116, 24 SW 233, 15 Ky. Law Rep. 581, 66 Am. St. Rep. 328; affirmed by the United States Supreme Court, 168 U.S. 488, 18 S. Ct. 199, 42 L.Ed. 553. The verbiage of Section 226 comports with the contemporary construction given thereto. It speaks of 'privileges granted', forbids 'schemes for similar purposes' and all lottery 'privileges or charters heretofore granted are revoked.' Lotteries had become an evil of such vast proportions and corrupting influence that nothing less than absolute prohibition of them was deemed adequate."

The Court in the Kentucky Jockey Club Decision came to the conclusion that it was such lottery licenses that § 226 was meant to bar, not pari-mutuel betting and that the State Legislature could therefore permit it.

This interpretation is supported by the words of the Constitutional Debate of 1890 itself, pp. 1174 and 1175, when a proposal was made to add the words "nor any other species of gambling or gaming" to the then, and still current:

> "Lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes and none shall be exercised and no scheme for similar purposes shall be allowed."

The delegate said:

> ". . . the gentleman proposes to add after the word 'allowed' — 'nor any other species of gambling or gaming'. I suppose he means that no other species of gambling or gaming should be allowed. I think that the law is perfectly plain in Kentucky today that it is not allowed. If the gentleman means to propose to restrain or limit the legislature granting certain

> privileges that have been granted in Kentucky, I think his amendment ought to come in another portion of the section. If the gentleman means to put it squarely that the legislature shall not authorize fairs or premiums to be distributed for the exhibition of horses or cattle; if he does not mean to license pooling privileges upon race courses, I think it ought to go into another section. If he means simply to prohibit pool selling, as now practiced throughout the country and cities, and towns, and villages, the law prohibits it now and parties are subject to the very heaviest of penalties; and I have no doubt the penalties are imposed. I have known instances in this Commonwealth where as high as $4,000.00 fines were imposed upon parties for violation of such laws. In other words, if the gentleman simply means to prohibit that species of gaming already prohibited by the law, it is mere child's play for us to put that in the Constitution because it is already the law of the land. It is different as to lotteries. because they are licensed by an act of the legislature. If I understand it, the Committee wants to prohibit such license being given by the Legislature. There is a very great difference in principle applying to the two."

The full debate on the amendment of Section 226 is set out in Petitioners' petition for rehearing which is appended hereto as Appendix 9.

The apparent unfamiliarity of the writer of the Kentucky Court of Appeals opinion with those debates and with the rationale of the *Kentucky Jockey Club* case, *supra,* is shown by his words in the present opinion:

> "Although some language in Kentucky Jockey Club indicated that the intention of Section 226 of the Kentucky Constitution was to prohibit state lotteries, the decision actually rested upon the intention expressed by the drafters of the Constitution."

It was at this point, when the Kentucky Court of Appeals sustained the lower Court, giving as grounds for its decision that pari-mutuel betting was exempt from Kentucky Constitution § 226 but Charitable Bingo would not be, that petitioner became aware of the intent of the Court of Appeals to place two interpretations on the same section of the Kentucky Constitution and in one instance allow the legislature to use its classification powers to make an exemption and in the second to strike down the Legislative act, completely ignoring the basis the Court had given for its earlier decision that section 226 barred only the granting of private lottery licenses. Compounding this travesty was the fact that the earlier class created by the Legislature was to be allowed to go on enjoying its special benefits while the second class created by the legislature was to be denied equal protection of the Law by the Courts themselves.

Petitioner immediately, in his petition for rehearing (appended hereto as Appendix 9) called to the Court's attention the denial of equal protection, under the Federal Constitution. Unfortunately, the Court of Appeals seemed to accept the view of the respondent's answer to the petition for rehearing which stated:

> "Continuing on p. 11 petitioner invokes that amendment of dubious origin, the 14th, and its equal protection clause, to assert that he and his associates must be permitted to operate lotteries because of Jockey Club which held pari-mutuel betting not to be a lottery outlawed by § 226. Such argument assumes the correctness of Jockey Club which this Court upon this appeal seems to question. But if petitioner's argument be accepted, then it would appear that both statutes, the one permitting pari-mutuel gambling and the other Bingo, are in conflict with Const., § 3, in that each purports to grant exclusive privileges to persons in the statutes designated and which are denied

> to all others. Appellees suggest that in relying upon the 14th Amendment petitioner mistook his bowsprit for his rudder."

and denied the petition for re-hearing, disposing of Petitioner's federal rights without comment.

Petitioner states at this point, if no earlier justification can be found, Federal jurisdiction lies. The Supreme Court of the United States summarized the rules on the raising of the Federal question in the case of *Great Northern Railway Co.* v. *Sunburst,* 287 U.S. 358, 77 L.Ed. 360, 53 S.Ct. 145, saying, at p. 366 of the U.S. reports, that the general rule is "that a constitutional question is urged too late, if put forward for the first time upon a petition for rehearing (American Surety Co. v. Baldwin, Ante, p. 156; Godchaux Co. v. Estopinal, 251 US 179)".

But the Court, on p. 367, says that there are two exceptions to the general rule:

> "The rule, general as it is, does not extend to cases where the constitutional question, however tardily raised, is considered and decided (Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co., 228 U.S. 326, 334; Cumberland Coal Co. v. Board, 284 U.S. 23), nor does it apply where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right. Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U.S. 673, 678; Missouri ex rel. Missouri Insurance Co. v. Gehner, 281 U.S. 313, 320; American Surety Co. v. Baldwin, supra."

Petitioner asserts that when the Kentucky Court of Appeals in rejecting Petitioner's argument that *Commonwealth* v. *Kentucky Jockey Club, supra* (appended hereto as Appendix 10) was controlling and its departure from its original rationale in allowing the Kentucky Legislature to create classes under its police power, on the basis that § 226 of the Kentucky Constitution solely and only deprived the legislature of the power to give private lottery licenses, then for the first time was the specter of denial of equal protection substantially raised as to the petitioner.

Petitioner, having studied the *Jockey Club* case and seeing the Court recognize the power of the Legislature to allow pari-mutuel betting by placing a limiting interpretation on the Kentucky Constitution fully expected the state court to follow its own precedent and could see no grounds for it doing otherwise.

It was only upon the rendering of the Court's decision that Petitioner saw the grave threat to his federal rights and picking up what had only been a pro-forma argument, seriously advanced the XIV Amendment rights to the State Court.

In the circumstances, Petitioner asserts he qualifies under the second exception outlined in *Great Northern Railroad Co., supra,* and even if jurisdiction would not otherwise lie because of timeliness, feels that it now does. Further, the first exception might also apply as both petitioner and respondent argued the Federal right and the appellate court ruled on it by rejecting the petition.

REASONS FOR GRANTING THE WRIT

There are two substantial reasons why the decision of the Kentucky Court of Appeals should be reviewed. First, two serious questions of Federal law, not previously ruled on by this Court are disposed of in the Court below without even a written opinion. Secondly, the opinion as given is likely not in accord with applicable decisions of the Court extrapolating the two questions from current case law. This court has ruled on a number of occasions that the equal protection clause of the XIV Amendment does not protect individuals from erroneous or inconsistent state court decisions, *Beck* v. *Washington,* 369 U.S. 541, 8 L.Ed. 2d 98, 7 S.Ct. 955, *reh. den.* 370 U.S. 965, 81 L Ed. 2d 834, 82 S.Ct. 1575 pp. 554-555; *Worchester County Co.* v. *Riley,* 302 U.S. 292 at 299, 82 L.Ed 2d 268, 58 S.Ct. 185; *Milwaukee Elec. Ry. Co.* v. *Milwaukee,* 252 U.S. 100 at 105-106, 64 L.Ed. 476, 40 S.Ct. 306.

But none of these cases involve a situation where a state court, in interpreting the state constitution, allows the state legislature to use its power to classify to create a privileged class in one set of circumstances, and on an identical set of facts, rule the legislative act unconstitutional.

This Court has long recognized the power of the legislature to classify provided that all persons in a class similarly situated to the purposes of a legislative act are treated equally and that there is a rational basis of substantive difference for various classes and they are not made arbitrarily. *Lloyd* v. *Dollison,* 194 U.S. 445 at 447, 90 L.Ed. 1062, 24 S.Ct. 703; *Southern Railway Co.* v. *Samuel E. Greene,* 216 U.S. 400 at 417, 54 L.Ed. 536, 30 S.Ct. 287; *Rinaldi* v. *Yeager,* 384 U.S. 302, 16 L.Ed. 2d 577, 86 S.Ct. 1497 at 309; *McLaughlin* v. *Florida,* 379 U.S. 184, 13 L.Ed. 2d 222, 84 S.Ct. 283 at 190.

What rational continuity can there be to Federal Constitutional Law if it forbids State Legislatures to classify on an arbitrary basis but permits State Courts to do so?

This Court has said:

> "Hence, in passing on the validity of the present classification, it is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided. Its function is only to determine whether it is possible to say that the legislative decision is without rational basis." Clark v. Paul Gray, Inc., 306 U.S. 583 at 594, 83 L.Ed. 1001, 59 S.Ct. 744, and in Inter-

national Harvester Co. v. Missouri, 234 U.S. 199 at 214, 58 L.Ed. 1276, 34 S.Ct. 859:

> "The foundation of our decision is, of course, the power of classification which a legislature may exercise, and the cases we have cited, as well as others which may be cited, demonstrate that some latitude must be allowed to the legislative judgment in selecting the 'basis of community'. We have said that it must be palpably arbitrary to authorize a judicial review of it, and that it cannot be disturbed by the courts 'unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.' " *Mo., Kan. & Tex. Ry. Co.* v. *May,* 194 U.S. 267, 269; *Williams* v. *Arkansas,* 217 U.S. 79, 90; *Watson* v. *Maryland,* 218 U.S. 173, 179.

To retreat from this position and to allow a State Court to limit the power of the state legislature to classify and in the present case, creating an arbitrary class, is not only to allow a breach of the XIV Amendment, but a serious infringement of the doctrine of the separation of powers and a failure to obey the constitutional mandate to guarantee a republican form of government to each state. There have been several cases, *People* v. *Monroe,* 182 N.E. 439; *Mills* v. *Agnew,* 286 F.Supp. 107 (1968); *Ex parte McKelvey,* 64 P2d 1003, that have said legislatures can discriminate by allowing some forms of gaming and gambling while denying others. But no case has been found where a state court could take into itself the classifying powers of the legislators to say which form of gambling would be allowed and which denied. To allow the present case to stand is to mortally wound our concept of a pluralistic society. If this decision stands, then let Baptist State Judges forbid drinking and dancing, let Catholic Judges forbid birth control and the rule of law becomes the rule of men.

The most damning feature of the present case, is that the Court, in proposing to reject the rule of law in the *Kentucky Jockey Club, supra,* that Section § 226 is only a limit on a private lottery, nevertheless intends to let race horse betting continue while denying charitable bingo. The professional gambler is allowed to flourish while elderly ladies are denied their evening and weekend recreation.

The two dissents on the Kentucky decision recognize this double-standard and said let the law be equal in enforcement. Both acts must be allowed or both struck down.

In *Chevron Oil Co.* v. *Hudson,* — U.S. —, 30 L.Ed. 2d 300, 92 S.Ct. —, this Court stated that the doctrine of nonretroactivity has been recognized outside of criminal cases many times both in constitutional and non-constitutional cases, setting out these standards on page 306 L. Ed. 2d:

> "(11-13) In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., Hanover Shoe v. United Shoe Machinery, supra, at 496, 20 L Ed 2d at 1243, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., Allen v. State Board of Elections, supra, at 572, 22 L Ed 2d at 20. Second, it has been stressed that '(w) e must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Linkletter v. Walker, supra, at 629, 14 L Ed 2d at 608. Finally, we have weighed the inequity imposed by retroactive application, for '(w) here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for

avoiding the "injustice or hardship" by a holding of non-retroactivity.' *Cipriano* v. *City of Houma, supra,* at 706, 23 L Ed 2d at 652."

In a surprising turn around, we have in the present case, a situation where great inequity will result if the law is not applied retroactively.

In the present case, we are not dealing with past accomplished facts, but an ongoing situation. If the new rule is to be allowed, then clearly, the past privileged class must also be struck down or a clear violation of equal protection will result.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MORRIS WEINTRAUB
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APPENDIX 1

No. 10602

CAMPBELL CIRCUIT COURT
DIVISION NO. TWO

SAMUEL KOSOFSKY, ET AL,
Plaintiffs,
vs.
ROBERT NAU, ET AL.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This litigation was instituted in the Campbell Circuit Court with the filing of a complaint for a Declaratory Judgment on July 10, 1970. At the same time, a motion for a temporary injunction was sought by the complainants. Contemporaneously, a motion on behalf of alleged qualified voters to intervene was sustained by the Court. The injunctive relief sought by the complainants against the City for paying or in any manner defraying the costs of a special election was overruled and subsequent pleadings and memorandums were filed. The issues were joined and all parties were then before the Court. The propositions submitted to the Court were solely a matter of law and not one of fact.

Therefore, this matter having been submitted to the Court for Finding of Facts, Conclusions of Law and a Judgment, based on the pleadings, exhibits and memorandums filed by the parties, the Court having considered the same and now being fully advised in the premises, makes the following:

FINDINGS OF FACT

The plaintiffs, Samuel Kosofsky and Robert A. Stith, an intervenor, are taxpayers of the corporate defendant, City of Newport, and by their complaint for a declaratory judgment asked the Court to restrain the said City from issuing any licenses under the pretended authority of K.R.S. Chapter 238, the bingo licensing act, and from expending any funds for the administration of said Act on the ground that the same is in conflict with the Constitution of the Commonwealth of Kentucky, Sections 51 (title to legislation), 59 (limitations upon the General Assembly), 60 (special laws) and 226 (Lotteries and gift enterprises forbidden), and therefore void.

By amendment to the complaint, the plaintiff asks similar relief as to the defendant, Commissioner of Revenue, and, further, to enjoin him from promulgating any rules or regulations on pretended authority of said Act, or expending any funds of his department in the administration thereof.

By its answer, the City of Newport admits the facts alleged in the complaint, but denies the legal effect thereof, thereby presenting for determination only an issue of law.

By his answer tendered herein, the Commissioner of Revenue denies certain allegations of the original complaint only, and by failing to deny the allegations of the amendment to the complaint admits them to be true, and upon consideration thereof, the Court determines that the pleadings of the plaintiff and said defendant present only an issue of law.

One William Otto was permitted to intervene and by his pleading asserts the validity of K.R.S. Chapter 238 and asks that said Act be adjudged in harmony with the Constitution. By his answer to the amended complaint, intervenor attempts to deny allegations in respect to the Commissioner of Revenue, but that prerogative lies only with the Commissioner, not with the intervenor. Since the allegations are not denied by the Commissioner, they are admitted to be true and the Court considers that the pleadings present only an issue of law.

The answer of the County Clerk and the Campbell County Election Commission relates only to the election provided for by the Act, and since the same has been held and the result ascertained, said defendants are no longer necessary or proper parties herein and no finding in respect to their status as defendants is required.

The Honorable John B. Breckenridge, Attorney General of the Commonwealth of Kentucky, has been notified of this proceeding by serving him with notice thereof and a copy of the complaint all in compliance with K.R.S. 418.075 (necessary parties; notice to Attorney General). Said Attorney General has not filed an answer herein or any other pleading.

A deposition of James Halley, of Colorado, taken on the 21st day of August, 1970, offered nothing by way of legal authority in this case, inasmuch as it was a factual statement taken from a lay person, a representative of a holding company for the Bingo King Company, a distributor of fund raising devices for charitable organizations.

CONCLUSIONS OF LAW

Chapter 238 of the Kentucky Revised Statutes purports to sanction the conduct of lotteries dependent upon the consent of the voters in cities in counties having a population of 75,000 or more. Although the Act employs the word "bingo" rather than lottery, one is but the synonym of the other as held by the Court of Appeals in *A. B. Long Music Co.* v. *Commonwealth* (1968), 429 SW 2nd, 391, 394, where it said:

> "The word 'lottery' is derived from the Italian word 'lotto', meaning lot or chance. Lotto was a form of political election originating in Genos about 1530. Webster's New International Dictionary, Section Edition; Encyclopedia Britannica, Volume 14, page 405. The elements of 'lottery' are a prize, an award thereof by chance, and a consideration. Minges v. City of Birmingham, 251 Ala. 65; 36 So. 2d 93. The word 'lottery' is a generic term and embraces all schemes for distribution of prizes by chance for consideration, including bingo. Nadlin v. Starick, Ohio Com. Pl., 194 N.E. 2d 81. Bingo, beano, keno, and lotto are all names for 'lottery'. Society of Good Neighbors v. Van Antwerp, 324 Mich. 22, 36 N.W. 2d 308; Bender v. Arundel Arena, Inc. 248 Md. 181, 236 A. 2d 7; People v. Kiefer, 173 Misc. 300, 16 N.Y.S. 2d 848. The 'numbers game' has been held to be a lottery. Gilley v. Commonwealth, 312 Ky. 584, 229 SW 2d 60, 19 A.L.R. 2d 1224. The above definition of a 'lottery' has been approved. Commonwealth v. Malco-Memphis Theatres, Inc., 293 Ky. 531, 169 S.W. 2d 596."

Kentucky Constitution Section 226 is in this language:

> "Lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and none shall be exercised, and no scheme for similar purposes shall be allowed. The General Assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked."

This mandate of the Constitution commandes (sic) the General Assembly to enforce this section by proper penalties, and this is done by enacting K.R.S. Chapter 436.360 (lotteries and gift enterprises prohibited) which punishes, as a felony, the conduct of lottery which Chapter 238 purports to sanction. The Act of 1970 entitled, "An Act Relating to the Licensing of Bingo", now codified as K.R.S. Chapter 238, is void in that it is in conflict with and forbidden by the Kentucky Constitution Section 226 and the general laws of Kentucky enacted pursuant to its command.

Plaintiff urges that the Act is also in conflict with the Kentucky Constitution Sec. 51, Board of Penitentiary Commissioners v. Spencer (1914) 159 Ky. 255, 166 S.W. 1017, and Sections 59 and 60, citing Columbia Trust Co. v. Lincoln Institute (1910), 138 Ky. 804, 129 S.W. 113. Having decided that the Act is forbidden by Section 226, the Court finds it unnecessary to adjudge the validity or invalidity under Sections 51, 59 and 60 and no opinion in respect thereto is expressed.

JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that K.R.S. Chapter 238 in its entirety is in contravention of Kentucky Constitution Section 226 and, therefore, void, and the defendant, City of Newport, be and is hereby enjoined from expending its funds any sum or sums of money under pretense of administering the provisions of said Act, and it is further enjoined from suffering or permitting any person, persons, firms, corporations or associations of persons to operate a lottery or lotteries (whether called bingos or by any other name) under pretended authority of said Act or otherwise.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all licenses heretofore issued by the corporate defendant for the conduct of lotteries pursuant to the provisions of said Act are without authority in law and are void, and do not exempt the holders thereof from the penalties of K.R.S. Chapter 436.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the defendant, James E. Luckett, as Commissioner of Revenue of the Commonwealth of Kentucky, be and he is hereby restrained and enjoined from promulgating any rules and regulations under pretended authority of said K.R.S. Chapter 238, and he is further restrained and enjoined from expending any funds allocated to the Department of Revenue for the administration of said Act herein declared to be in violation of the Constitution of the Commonwealth of Kentucky.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, Robert Nau as County Clerk, Albert Howe, Robert Caudill and Jean Caudill as Members of the Campbell County Election Commission be, and they are hereby restrained and enjoined from conducting any election under pretended authority of said Act.

Plaintiffs will recover of the corporate defendant the costs of this action, for which execution may issue.

/s/ Paul J. Stapleton, Judge

APPENDIX 2

Rendered: November 5, 1971

COURT OF APPEALS OF KENTUCKY

WILLIAM "BILL" OTTO ET AL
Appellants
vs.
SAMUEL KOSOFSKY and ROBERT A. STITH
Appellees

AND:

CITY OF NEWPORT, KENTUCKY
Appellant
vs.
SAMUEL KOSOFSKY and ROBERT A. STITH
Appellees

APPEAL FROM THE CAMPBELL CIRCUIT COURT
HONORABLE PAUL J. STAPLETON, JUDGE

CONSOLIDATED CASES

OPINION OF THE COURT BY

COMMISSIONER VANCE

AFFIRMING

This is an appeal from a judgment which held the "Bingo Licensing Act" unconstitutional. The "Bingo Licensing Act," hereinafter referred to as the Act, was enacted as Chapter 60 of the Acts of the General Assembly of the Commonwealth of Kentucky, 1970, and is now codified as Chapter 238 of the Kentucky Revised Statutes.

The Act provides that cities in counties having a population of 75,000 or more persons may license certain civic, charitable, fraternal, religious and veterans organizations to operate bingo games with the net proceeds of the game to be donated to educational, charitable, patriotic or religious uses.

Bingo is defined in the Act as a game played for prizes with cards bearing numbers or other designations, five or more in one line, the holder covering numbers as objects similarly numbered are drawn from a receptacle and the game being won by the person or persons who first cover a previously designated arrangement of numbers on such a card, and wherein the cards or tickets or rights to participate in such games are made available strictly on a voluntary donative basis and no cash payment or other consideration is required as a prerequisite to participate. The Act further provides that it shall remain inoperative unless or until it is adopted by the legal voters of any city to which it is applicable.

The city council of the city of Newport, Kentucky, (a city within a county containing more than 75,000 persons) passed a resolution calling a special election to obtain the sense of the voters concerning the adoption of the Act. Appellee, Kosofsky, instituted this action as a citizen and taxpayer seeking to have the Act declared invalid and seeking an injunction to prohibit the city of Newport from expending public funds in the conduct of the special election. The County Court Clerk of Campbell County, the members of the Election Commission and the City of Newport were named defendants.

The appellant, Otto, was permitted to intervene on behalf of a class of persons interested in legalized bingo on the ground that the named defendants would not adequately represent the position of intervener. Appellant, Otto, denied the allegations of the complaint and asked for a declaration of the validity of Chapter 238 of the Kentucky Revised Statutes. The court declined to enjoin the election but required the intervener, Otto, to post a $6,000.00 bond to guarantee payment of the costs of the election. The election was held and its costs were defrayed from the bond posted by Otto. The voters adopted the provisions of the Act.

After the adoption of the Act by the voters, appellee, Kosofsky, amended his complaint and appellee, Stith, was permitted to file an intervening complaint in which it was alleged that any expenditure of city funds in the administration of licensing bingo would constitute illegal expenditure.

The appellees claimed the Act violates the provisions of Sections 3, 59, 60 and 226 of the Kentucky Constitution. The trial court upheld the appellees' contention with respect to Section 226 of the Constitution and did not pass upon the other alleged constitutional objections.

Judgment was entered which declared the Act unconstitutional, enjoined expenditure by the city of public funds in administering the Act, invalidated any licenses which had been issued prior to the judgment and enjoined the Commissioner of Revenue from promulgating regulations pursuant to the authority of the Act. We affirm the judgment.

The first attack upon the judgment is that the appellees had no standing to maintain the suit, and in the alternative, that the issue became moot and presented no justiciable controversy.

The defensive pleadings in this litigation consisted of allegations that the complaint, the amended complaint and intervening complaint failed to state a claim for relief, a general denial and an affirmative request that the validity of the Act be declared. Nowhere was *standing to sue* challenged or brought to the attention of the trial court.

The claim that the issue became moot was likewise not raised in the trial court. It is based upon the theory that this litigation was instituted as a taxpayers' suit to enjoin the expenditure of public funds in holding a special election. It is argued that the matter became moot when the cost of the election was defrayed from monies posted by intervener, Otto, and in fact no public money was expended. This argument overlooks the allegations and proof that some public funds would necessarily be expended in the administration of the Act.

Under KRS 418.065 courts may decline to give declaratory judgments in a number of instances. Without deciding whether the court properly could have declined to enter a declaratory judgment in this case, we hold that the undertaking to make a declaration of rights was not an abuse of the court's discretion. An important public question is here presented and all parties joined in asking that the validity of the Act be determined. Having asked for the declaration, the appellants are in no position to complain that one was given.

Section 226 of the Constitution of Kentucky provides:

> "Lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and none shall be exercised, and no schemes for similar purposes shall be allowed. The general assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked."

The appellant, Otto, contends that the Act is not violative of Section 226 because bingo, although admittedly a form of gambling, is not a lottery within the meaning of the constitutional provision. Reliance is placed upon Commonwealth v. Kentucky Jockey Club, 238 Ky. 739, 38 S.W. 2d 987 (1931); Greater Loretta Imp. Ass'n. v. State Ex Rel. Boone, Fla., 234 So. 2d 665 (1970) and Bender v. Arundel Arena, Inc., 248 Md. 181, 236 A. 2d 7 (1967).

Kentucky Jockey Club held pari-mutuel betting at race tracks to be a form of gambling not prohibited by Section 226 of the Constitution. In that case the court referred to the debates of the constitutional convention which adopted our present constitution. In those debates the question of whether pooling privileges at race tracks should be prohibited by the constitution was discussed and the delegates clearly indicated an intention that race track pooling was not to be prohibited by the constitutional provision against lotteries. In *Kentucky Jockey Club* the court gave effect to the intention expressed by the drafters of the constitution.

In *Greater Loretta Improvement Association*, the Florida Court held that bingo was not prohibited by the Florida Constitution. In 1968, Florida adopted a constitution containing this provision:

> "'Lotteries, *other than the types of pari-mutuel pools authorized by law as of the effective date of this constitution*, are hereby prohibited in this state.'" (Emphasis ours)

In 1967 a statute was enacted in Florida legalizing bingo. The statute was in effect at the time the Florida Constitution was adopted and in construing the statute the Florida Court concluded that bingo was a lottery but held it to be within the class of lotteries which were authorized as of the effective date of the constitution and therefore excluded from the prohibition of the constitution.

In Maryland the constitutional provision against lotteries was as follows:

> " '* * * No lottery grant shall ever hereafter be authorized by the General Assembly.' "

In construing this section of the constitution the Maryland Court held in Bender that the constitutional provision referred to lotteries granted or enfranchised by the state.

Although some language in *Kentucky Jockey Club* indicated that the intent of Section 226 of the Kentucky Constitution was to prohibit state lotteries, the decision actually rested upon the intention expressed by the drafters of the constitution.

Florida and Maryland, in upholding statutes which legalized bingo, simply excluded from the constitutional prohibition against lotteries a form of gambling which was shown by the legislative and judicial history of those states to be excluded from the prohibition of the constitution. In *Kentucky Jockey Club* this court recognized the same principle and followed the same course as to pari-mutuel betting. The attempt to include bingo within this same principle must fail because there is nothing in our judicial or legislative history to support a construction that bingo is not a form of lottery or that it was not intended to be prohibited by Section 226 of the Constitution.

A lottery is a scheme for the distribution of prizes or things of value purely by lot or chance among persons who have paid or agreed to pay a consideration for the chance to share in the distribution. Commonwealth v. Malco-Memphis Theatres, 293 Ky. 531, 169 S.W. 2d 596 (1943). Bingo is obviously such a scheme. It was so recognized by this court in A. B. Long Music Company v. Commonwealth, Ky., 429 S.W. 2d 391 (1968), in which this court said:

> "* * * The word 'lottery' is a generic term and embraces all schemes for distribution of prizes by chance for consideration, including *bingo*. * * *." (Emphasis ours)

The General Assembly tacitly recognized the fact that bingo is a lottery when it provided in Section 49(2) of the Act as follows:

> "Any bingo game not conducted under the provisions of this Act shall be a lottery and shall be considered in violation of KRS Chapter 436."

The Act thus embodies a legislative recognition that bingo is a lottery and constitutes a legislative attempt to legalize a form of lottery in the special circumstances provided in the Act.

We cannot consider here the purpose for which the Act was adopted or whether good or bad would result from it. The plain fact is that our constitution forbids all lotteries and gift enterprises. This prohibition can be repealed by a constitutional amendment but not by a legislative enactment.

The judgment is affirmed.

Milliken, C. J., Palmore, Osborne, Steinfeld, Reed and Neikirk, J.J., concur.

Hill, J., dissents.

SEPARATE CONCURRING OPINION BY OSBORNE, J.

I concur in the majority opinion. I am of the opinion that pari-mutuel pools also constitute a lottery in violation of Section 226 of the Constitution of Kentucky, *Commonwealth* v. *Kentucky Jockey Club,* 238 Ky. 739, 38 S.W. 2d 987 (1931), notwithstanding.

DISSENTING OPINION BY HILL, J.

For these reasons I respectfully dissent from the majority in this case. I agree with the majority that bingo violates Section 226 of our Constitution. By the same token, I think pari-mutuel betting on horse races also violates the same section of the Constitution. Both constitute lotteries. In view of the millions of dollars invested in the racing business since *Commonwealth* v. *Kentucky Jockey Club,* 238 Ky. 739, 38 S.W. 2d 987 (1931), was decided, I would invoke the rule of stare decisis and let stand *Kentucky Jockey Club,* supra. However, I would follow City of Ashland v. Heck's Inc., Ky., 407 S.W. 2d 421 (1966), and refuse to interfere with bingo. Any other course to me amounts to judicial dishonesty.

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APPENDIX 3

Chapter 230

RACING

* * *

GENERAL PROVISIONS

230.010 [3990a-5] **Definitions; application.**

(1) As used in KRS 230.100 to 230.140, unless the context requires otherwise:

(a) "Association" includes incorporated as well as unincorporated associations; and

(b) "Commission" means "Kentucky Trotting Commission."

(c) "Trotting races" shall include both trotting and pacing races.

(2) KRS 230.100 to 230.140 do not apply to trots or trotting races conducted by any state, county or other fair association, holding not more than one meeting annually, which meeting does not exceed six days.

* * *

230.070 [1326] **Entering horse under assumed name or out of proper class prohibited.**

No person shall knowingly enter or cause to be entered for competition, or compete, for a prize or stake, or drive any horse, under an assumed name, or out of its proper class, where the prize or stake is to be decided by a contest of speed.

230.080 [1327] Change of horse's name; determination of class; misrepresentation of performance.

(1) No person shall change the name of any horse for the purpose of entry for competition in any contest of speed, after the horse has once contested for a prize or stake, except as provided by the code of rules of the association under which the contest is advertised to be conducted.

(2) The class to which a horse belongs, for the purpose of an entry in any contest of speed, shall be determined by the public performance of that horse in any former contest or trial of speed, as provided by the rules of the association under which the proposed contest is advertised to be conducted.

(3) No person shall knowingly misrepresent or fraudulently conceal the public performance in any former contest, or trial of speed, of any horse that he proposes to enter in a contest, whether the horse is actually entered or not.

230.090 [1328] Official timer not to announce false time.

No official timer at any trotting or running race shall announce willfully and falsely a slower or faster time than that actually accomplished by a horse, when the result of that race is to constitute a record.

TROTTING

230.100 Kentucky Trotting Commission; organization; biennial report.

(1) The Kentucky Trotting Commission shall be an agency independent of state administrative departments.

(2) The commission shall consist of five persons appointed by the Governor. The members of the commission shall hold their offices for a term of four years.

(3) The commission shall biennially make a full report to the General Assembly of its proceedings for the two-year period ending December 1 preceding the meeting of the General Assembly, and shall embody in the report such suggestions and recommendations as it deems desirable.

230.110 Secretary of trotting commission.

(1) The Governor shall tppoint a secretary of the commission, for a term of not exceeding four years.

(2) The secretary shall keep a full record of the proceedings of the commission, preserve at its general office all books, maps, documents and papers entrusted to the commission, and perform such other duties as the commission prescribes.

(3) The secretary shall receive an annual salary which shall be fixed by the commission, and which shall be paid by proportionate contributions of the several trotting associations licensed by the commission. The commission, on or before December 1 of each year, shall assess upon each trotting association its just proportion of the salary of the secretary.

230.120 Regulation and licensing of trotting races.

(1) The commission may prescribe the regulations and conditions under which trotting horse races shall be conducted in this state.

(2) An association desiring to conduct trotting horse races may annually apply to the commission for a license. If in the judgment of the commission a proper case for issuance is shown, it may grant the license for a term of

one year. Every license shall contain a condition that all trotting horse races or meetings conducted under it shall be subject to the regulations and conditions from time to time prescribed by the commission.

(3) A license shall be revocable by the commission for any violation of it or whenever the continuance of the license is deemed by the commission not conducive to the interests of legitimate racing. If a license is refused or revoked, the commission shall publicly state its reasons for the refusal or revocation and those reasons shall be written in full in the minute book of the commission, which shall at all times be subject to inspection by anyone desiring to inspect it. A refusal of the commission to grant to any trotting association a license, or to assign any trotting association at least forty days in each year, if desired for trotting races or meetings at the track of the association, and the revocation of the license of any association shall be subject to judicial review.

230.130 Unlicensed races prohibited; may be enjoined.

Except as provided in subsection (2) of KRS 230.010:

(1) No trotting horse race shall be conducted except by an association licensed by the commission.

(2) No person shall operate or participate in any trotting horse race meeting at which trotting horse racing is permitted for a prize or stake, unless the race meeting has been licensed under KRS 230.120.

(3) Every trotting horse race not licensed under KRS 230.120 is a public nuisance, and the commission may obtain an injunction against it, in the circuit court of the county where the unlicensed race is proposed to take place.

230.140 Time when meetings may be held; interest in prizes.

(1) An association formed for the purpose of racing and breeding or improving the breed of trotting horses and conducting contests of speed may hold one or more trotting race meetings between April 1 and December 1 of each year.

(2) At such meetings the association or the owners of the horses engaged in the trotting races, or others that are not participants in the racing, may contribute prizes or stakes to be contested for, but no person other than the owner of a horse contesting in a trotting race shall have any pecuniary interest in a prize or stake contested for in that race, or be entitled to, or receive any portion of the prize or stake after the race has been finished. The whole of the prize or stake shall be alloted in accordance with the terms of the race.

* * *

RACING

230.210 Definitions for KRS 230.210 to 230.360.

As used in KRS 230.210 to 230.360 unless the context requires otherwise:

(1) "Association" means any person licensed by the Kentucky State Racing Commission under KRS 230.300 and engaged in the conduct of a recognized thoroughbred race meeting;

(2) "Commission" means the Kentucky State Racing Commission;

(3) "Commisisoner" means a member of the Kentucky State Racing Commission;

(4) "Secretary" means the Secretary of the Kentucky State Racing Commission;

(5) "Thoroughbred race or thorougbred racing" shall include that form of horse racing in which each horse participating in such race is a thorougbred, (i.e., meeting the requirements of and registered with The Jockey Club of New York) and is mounted by a jockey.

230.220 Kentucky State Racing Commission; membership; office; open meetings; quorum.

(1) There is hereby created the Kentucky State Racing Commission which shall be an independent agency of state government. The Commission shall consist of five members all of whom shall be appointed by the Governor. Not less than three of the members shall be breeders and raisers of thoroughbred stock in Kentucky, and no two of the members shall be directors of the same racing association. Commissioners shall be appointed for a term of four years and until their successors are appointed or qualified. Any vacancy on the Commission shall be filled by the Governor for the unexpired term. Each Commissioner shall be eligible for reappointment in the discretion of the Governor. Commissioners shall serve without salaries, but shall be reimbursed for all expenses paid or incurred in the discharge of official business. The Commission shall designate one of their number as chairman and another as vice-chairman. Before entering upon the discharge of their duties, each commissioner shall take the constitutional oath of office.

(2) The Commission shall establish and maintain a general office for the transaction of its business and may in its discretion establish a branch office or offices. The Commission may hold meetings at any of such offices or at any other place when the Convenience of the Commission requires. All meetings of the Commission shall be open and public, and all persons shall be permitted to

attend any meetings. A majority of the Commission shall constitute a quorum for the transaction of its business or exercise of any of its powers.

* * *

230.230 Personnel duties; compensation.

(1) The Governor shall appoint a secretary for the commission for a term not to exceed four years and who may be removed in the same manner as a member of the commission. The secretary shall possess the powers and perform the duties imposed upon him by KRS 230.210 to 230.360, and such other duties as the commission may direct or prescribe. The secretary shall keep a full record of all proceedings before the commission and shall preserve at its general office all books, maps, records, documents, licenses and other papers of the commission. All records of the commission shall be open to inspection by the public during regular office hours.

(2) The commission may employ an assistant secretary and stenographers, clerks and other personnel as it may deem necessary to efficiently operate its general office or any branch thereof. The commission shall fix the compensation of such employes. Any member of the commission or the secretary thereof or any employe referred to in this section shall be reimbursed for expenses paid or incurred in the discharge of official business when approved by the commission. The compensation of the employes referred to in this section, together with reimbursement of expenses incurred by such employes, a member of the commission or the secretary thereof, shall be paid from commission funds.

230.240 Additional employes for regulation of race meetings; payment of compensation.

(1) In addition to the employes referred to in KRS 230.230, the commission may employ, at reasonable compensation, stewards, supervisors of mutuels, veterinarians, inspectors, accountants, guards and other employes deemed by the commission to be essential at or in connection with any thoroughbred race meeting and to the best interest of racing. The commission for the purpose of maintaining integrity and honesty in racing shall prescribe by rule the powers and duties of the persons employed under this section. The commission shall promulgate rules and regulations for effectively preventing the use of improper devices, the administration of drugs or stimulants or other improper acts for the purpose of affecting the speed or health of horses in races in which they are to participate, and in connection therewith the commission is authorized to acquire, operate and maintain, or to provide by contract for the maintenance and operation of, a testing laboratory and related facilities, for the purpose of saliva, urinal or other tests, and to purchase supplies and equipment for and in connection with such laboratory or testing processes. The expense of the laboratory or other testing processes, whether furnished by contract or otherwise, together with all supplies and equipment used in connection therewith, shall be paid by the various associations licensed under KRS 230.210 to 230.360 in such manner and in such proportions as the commission may by rule provide.

(2) The compensation of the employes referred to in this section shall be paid by the licensee conducting the thoroughbred race meeting in connection with which said employes are utilized or employed. The salary of the secretary to the commission shall be prorated among and paid

by the various associations licensed under KRS 230.210 to 230.360 in the manner as the commission may, by rule, provide. The employes referred to in this section shall be deemed employes of the commission, and are paid by the licensee or association for convenience only.

(3) Each person, as a condition precedent to the privilege of receiving a license under KRS 230.210 to 230.360 to conduct a thoroughbred race meeting shall be deemed to have agreed that it will pay such expenses and compensation as provided in this section and as may be actually and reasonably incurred.

230.250 Duty of Attorney General.

When requested by the commission, the Attorney General of Kentucky, or such Assistant Attorney-General as he may designate, shall, without additional compensation, advise the commission and represent it in all legal proceedings.

230.260 Authority of commission.

The commission, in the interest of breeding or the improvement of the breed of thoroughbred horses, shall have all powers necessary and proper to carry out fully and effectually the provisions of KRS 230.210 to 230.360 including, but without limitation, the following:

(1) The commission is vested with full jurisdiction and supervision over all thoroughbred race meetings in this state and over all persons and associations having to do with the conduct of such meetings;

(2) The commission, its representatives and employes, may visit, investigate and have free access to the office, tract, facilities or other places of business of any licensee for the purpose of satisfying itself that KRS 230.210 to 230.360 and its rules and regulations are strictly complied with;

(3) The commission shall have full authority to prescribe rules, regulations and conditions under which thoroughbred horse racing shall be conducted in this state and to fix and regulate the minimum amount of purses, stakes or awards to be offered for the conduct of any thoroughbred race meeting;

(4) Applications for licenses shall be made in the form, in the manner and contain information as the commission may, by rule, require. Fees for all licenses issued under KRS 230.310 shall be prescribed by and paid to the commission;

(5) Any of the foregoing rules, regulations and conditions may be altered, amended, repealed and published from time to time. All rules, regulations and conditions shall become effective thirty days after the filing thereof with the Legislative Research Commission unless the Governor finds an emergency to exist in which event the same shall become effective immediately upon filing with the Legislative Research Commission. The commission may, but shall not be required to, advertise any of its regulations either before or after filing;

(6) The commission may issue subpoenas for the attendance of witnesses before it and administer oaths to such witnesses whenever, in the judgment of the commission, it is necessary to do so for the effectual discharge of its duties. Any person failing to appear before the commission at the time and place specified in said summons, or refusing to testify, shall be deemed guilty of a misdemeanor and upon conviction by a court of competent jurisdiction shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than six months, or both. False swearing on the part of any witness shall be deemed perjury and punished as such;

(7) The commission shall have authority to compel

any racing association licensed under KRS 230.120 to 230.360 to file with the commission at the end of its fiscal year, a balance sheet, showing assets and liabilities, and an earnings statement, together with a list of its stockholders or other persons holding a beneficial interest in the association.

* * *

230.270 Biennial report to General Assembly required.

The commission shall biennially make a full report to the General Assembly of its proceedings for the two-year period ending December 1 preceding the meeting of the General Assembly and may embody in the report such suggestions and recommendations as it deems desirable.

230.280 License for race meeting required.

No person shall hold or conduct any thoroughbred race meeting for any stake, purse, or reward within the Commonwealth of Kentucky without securing the required license from the commission.

230.290 Provisions applicable to all licenses.

All licenses granted under KRS 230.210 to 230.360:

(1) shall be in writing;

(2) Shall be subject to all rules, regulations and conditions as may from time to time be prescribed by the commission;

(3) Shall contain such conditions as may be considered necessary or desirable by the commission for purposes of KRS 230.210 to 230.360 and

(4) No license shall extend beyond the end of the calendar year for which it was issued.

230.300 License to conduct race meeting.

(1) Any person desiring to conduct thoroughbred racing within the Commonwealth of Kentucky during any calendar year shall first apply to the commission for a license to do so. The application shall be filed at the commission's general office on or before a day fixed by the commission. The application shall specify the location of the track and the days on which racing is desired to be conducted or held and shall be in the form and contain such other information and data as the commission may, by rule, require.

(2) The commission shall as soon as practicable but in no event later than March 1 in any calendar year award all dates for racing in Kentucky during the year. The commission may issue such license to conduct a thoroughbred race meeting to any person who makes the aforesaid application, who has complied with the requirements of KRS 230.210 to 230.360 as well as the rules of the commission and where the issuance thereof is in the best interest of racing generally. As a condition precedent to the issuance of the license, the commission may require a surety bond or other surety conditioned upon the payment of all taxes due the Commonwealth, together with the payment of operating expenses including purses and awards to owners of horses participating in races.

(3) Every license issued under KRS 230.210 to 230.360 shall specify among other things the name of the person to whom issued, the address and location of the track where the thoroughbred race meeting to which it relates is to be held or conducted, and the days and hours of the day when the meeting will be permitted.

(4) A license issued under this section is neither transferable nor assignable and shall not permit the conduct of a thoroughbred race meeting at any track not specified

therein. However, if the track specified becomes unsuitable for thoroughbred racing because of flood, fire or other catastrophe, the commission may, upon application, authorize the meeting, or any remaining portion thereof, to be conducted at any other suitable track available for that purpose, provided that the owner of such track willingly consents to the use thereof.

(5) Thoroughbred racing dates may be awarded and licenses issued authorizing thoroughbred racing on any day of the year except Sundays. No thoroughbred racing shall be held or conducted on any Sunday. Thoroughbred racing shall be held or conducted only between sunrise and midnight.

(6) The commission may at any time require the removal of any official or employe of any association in those instances where it has reason to believe that the official or employe has been guilty of any dishonest practice in connection with thoroughbred racing or has failed to comply with any condition of his license or has violated any law or any rule or regulation of this commission.

(7) Every thoroughbred race not licensed under this section is hereby declared to be a public nuisance and the commission may obtain an injunction against the same in the circuit court of the county where the unlicensed race is proposed to take place.

230.310 License for participants in racing.

Every person not required to be licensed under KRS 230.300 who participates in or has anything to do with thoroughbred racing, including a horse owner, jockey, apprentice, exercise boy, agent, trainer, observer, stable foreman, groom, valet, veterinary, horse shoer, steward, horse owner, owner's stable watchman, starter or starter's helper, timer, judge, and other person acting as a racing official of any thoroughbred race meeting and every employe of a pari-mutuel department shall be licensed by the commission pursuant to such rules and regulations as the commission may adopt and upon the payment of a license fee fixed and determined by the commission. No person required to be licensed by this section may participate in any capacity in any thoroughbred race meeting without a valid and unrevoked license authorizing such participation. An original license issued under this section shall be issued for the calendar year in which it is issued and shall be renewable annually upon the payment of the fee prescribed for the issuance of an original license of the same kind. The license shall be valid at all thoroughbred race meetings in this state during the period for which it is issued unless it is suspended or revoked prior to the expiration of such period. No qualified person shall be refused a license under this section without just cause, but for just cause the same may be denied and, after issuance, may be suspended or revoked.

230.320 Revocation, suspension of license; review.

(1) Every license granted under KRS 230.210 to 230.-360 is subject to revocation or suspension by the commission in any case where it has reason to believe that any provision of KRS 230.210 to 230.360 or rule, regulation or condition of the commission affecting it has not been complied with or has been broken or violated. The commission in the interest of honesty and integrity of thoroughbred horse racing may prescribe rules and regulations under which any license may be denied, suspended or revoked.

(2) If any license is denied, suspended or revoked the commission shall state publicly its reasons for the suspension or revocation and shall cause an entry of such reasons to be made on its record book. The action of the

commission in denying, suspending or revoking any license issued under KRS 230.210 to 230.360 is final except that such action is subject to review by any court of competent jurisdiction. The action of the commission shall remain in full force and effect until reversed or modified by a valid order of such court.

* * *

230.330 Appeal of any order to Franklin Circuit Court.

Any licensee or any applicant aggrieved by any order of the commission may appeal to the Franklin Circuit Court within the time and in the manner provided by KRS 243.560 to 243.590.

230.340 Regulation of pari-mutuel wagering.

(1) The commission shall adopt rule governing and regulating mutuel wagering on thoroughbred races under what is known as the pari-mutuel system of wagering. Such wagering shall be conducted only by a person licensed under KRS 230.210 to 230.360 to conduct a thoroughbred race meeting and only upon the licensed premises and on the dates and hours for which racing has been authorized by the commission. The pari-mutuel system of wagering shall be operated only by a totalizator or other mechanical equipment approved by the commission. The commission shall not require any particular make of equipment.

(2) In no event shall the operation of a pari-mutuel system for betting where authorized by law constitute grounds for the revocation or suspension of any license issued and held under KRS 230.350.

(3) All reported but unclaimed pari-mutuel winning tickets held in this state by any person or association operating a pari-mutuel or similar system of betting at thoroughbred race meetings shall be presumed abandoned

within the meaning of KRS Chapter 393, if not claimed by the person entitled thereto within two years from the time the ticket became payable.

* * *

230.350 Licensee may be issued temporary alcoholic beverage license.

Any person licensed by this commission under KRS 230.300 may be issued by the Alcoholic Beverage Control Board and may hold a distilled spirits and wine special temporary license and malt beverage special temporary license as provided in KRS 243.260 and 243.290. The licenses and each of them when issued shall be valid and effective only upon premises licensed by this commission and upon the dates and hours for which racing has been authorized by this commission.

230.360 Application of KRS 230.210 to 230.360.

(1) KRS 230.210 to 230.360 is not applicable to trotting or pacing meets or races conducted in this state.

(2) The provisions of KRS 230.210 to 230.360 are intended to be state-wide and exclusive in their effect and no city, county or other political subdivision of state government shall have the power or authority to make or enforce any local laws, ordinances or regulations on the subject of thoroughbred race meetings. Any person licensed under KRS 230.300 shall continue to pay, or be responsible for the payment of, all state taxes presently imposed by law, including but without limitation, license taxes imposed under KRS 137.170 to 137.190, and KRS 137.990 together with admission taxes imposed by KRS 138.480 to 138.490, and the pari-mutuel taxes imposed by KRS 138.510 to 138.550, and all state, as well as local, ad valorem

taxes; provided, however, no tax shall be imposed by the state or any subdivision thereof upon, or measured by, that portion of the excise tax imposed upon pari-mutuel betting at running and trotting horse race tracks which is collected and retained by the operators thereof under the provisions of KRS 138.510 to 138.550, both inclusive.

QUARTER HORSE RACING

230.410 Quarter horse defined.

As used in KRS 230.410 to 230.447 "quarter horse" means a horse that is registered with the American Quarter Horse Association of Amarillo, Texas.

230.413 Kentucky Quarter Horse Commission, members, terms, report.

(1) The Kentucky Quarter Horse Commission shall be an agency independent of state administrative departments.

(2) The commission shall consist of three persons appointed by the Governor. The members of the commission shall hold their offices for a term of four years.

(3) The commission shall biennially make a full report to the General Assembly of its proceedings for the two-year period ending December 1 preceding the meeting of the General Assembly, and shall embody in the report such suggestions and recommendations as it deems desirable.

230.417 Secretary of commission, functions.

(1) The Governor shall appoint a secretary of the commission, for a term of not exceeding four years.

(2) The secretary shall keep a full record of the proceedings of the commission, preserve at its general office all books, maps, documents and papers entrusted to the

commission, and perform such other duties as the commission prescribes.

(3) The secretary shall receive an annual salary which shall be fixed by the commission, and which shall be paid by proportionate contributions of the several quarter horse associations licensed by the commission. The commission, on or before December 1 of each year, shall assess upon each quarter horse association its just proportion of the salary of the secretary.

230.420 Regulations for races; license required; revocation of license.

(1) The commission may prescribe the regulations and conditions under which quarter horse races shall be conducted in this state.

(2) An association desiring to conduct quarter horse races may annually apply to the commission for a license. If in the judgment of the commission a proper case for issuance is shown, it may grant the license for a term of one year. Every license shall contain a condition that all quarter horse races or meetings conducted under it shall be subject to the regulations and conditions from time to time prescribed by the commission.

(3) A license shall be revocable by the commission for any violation of it or whenever the continuance of the license is deemed by the commission not conducive to the interests of legitimate racing. If a license is refused or revoked, the commission shall publicly state its reasons for the refusal or revocation and those reasons shall be written in full in the minute book of the commission, which shall at all times be subject to inspection by anyone desiring to inspect it. A refusal of the commission to grant to any quarter horse association a license, or to assign any quarter horse association at least forty days in each

year, if desired for quarter horse races or meetings at the track of the association, and the revocation of the license of any association shall be subject to judicial review.

230.423 Conducting or participating in non-licensed race prohibited; public nuisance, abatement.

(1) No quarter horse race shall be conducted except by an association licensed by the commission.

(2) No person shall operate or participate in any quarter horse race meeting at which quarter horse racing is permitted for a prize or stake, unless the race meeting has been licensed under KRS 230.410 to 230.447.

(3) Every quarter horse race not licensed under KRS 230.410 to 230.447 is a public nuisance, and the commission may obtain an injunction against it, in the circuit court of the county where the unlicensed race is proposed to take place.

230.427 Race meetings, when held; prize regulations.

(1) An association formed for the purpose of racing and breeding or improving the breed of quarter horses and conducting contests of speed may hold one or more quarter horse race meetings between April 1 and December 1 of each year.

(2) At such meetings the association or the owners of the horses engaged in the quarter horse races, or others that are not participants in the racing, may contribute prizes or stakes to be contested for, but no person other than the owner of a horse contesting in a quarter horse race shall have any pecuniary interest in a prize or stake contested for in that race, or be entitled to, or receive any portion of the prize or stake after the race has been finished. The whole of the prize or stake shall be alloted in accordance with the terms of the race.

230.430 Entry of horse under false name or out of class prohibited.

No person shall knowingly enter or cause to be entered for competition, or compete, for a prize or stake, or ride any horse under an assumed name, or out of its proper class, where the prize or stake is to be decided by a contest of speed.

230.433 Change of name, concealing or misrepresenting past performance prohibited.

(1) No person shall change the name of any horse for the purpose of entry for competition in any contest of speed, after the horse has once contested for a prize or stake, except as provided by the code of rules of the association under which the contest is advertised to be conducted.

(2) The class to which a horse belongs, for the purpose of an entry in any contest of speed, shall be determined by the public performance of that horse in any former contest or trial of speed, as provided by the rules of the association under which the proposed contest is advertised to be conducted.

(3) No person shall knowingly misrepresent or fraudulently conceal the public performance in any former contest, or trial speed, of any horse that he proposes to enter in a contest, whether the horse is actually entered or not.

230.437 Timer not to announce false time.

No official timer at any quarter horse race shall announce willfully and falsely a slower or faster time than that actually accomplished by a horse, when the result of that race is to constitute a record.

230.440 Licensed track to be bonded.

No license shall be issued to any individual or association owning or operating a quarter horse track until said individual or association posts a bond to be determined by the commission to cover any indebtedness said individual or association may incur during the days alloted for racing.

230.443 Horse foaled by artificial insemination ineligible for racing.

No quarter horse foaled by artificial insemination shall be eligible to race under the provisions of KRS 230.410 to 230.447.

230.447 Wagering governed by regulations.

(1) The commission shall adopt rules governing and regulating mutuel wagering on thoroughbred races under what is known as the pari-mutuel system of wagering. Such wagering shall be conducted only by a person licensed under KRS 230.410 to 230.447 to conduct a quarter horse race meeting and only upon the licensed premises and on the dates and hours for which racing has been authorized by the commission. The pari-mutuel system of wagering shall be operated only by a totalizator or other mechanical equipment approved by the commission. The commission shall not require any particular make of equipment.

(2) In no event shall the operation of a pari-mutuel system for betting where authorized by law constitute grounds for the revocation or suspension of any license issued and held under KRS 230.410 to 230.447.

(3) All reported but unclaimed parti-mutuel winning tickets held in this state by any person or association operating a pari-mutuel or similar system of betting at thoroughbred race meetings shall be presumed abandoned

within the meaning of KRS Chapter 393, if not claimed by the person entitled thereto within two years from the time the ticket became payable.

* * *

230.990 [1326; 1327; 1328; 3990a-4] **Penalties.**

(1) Any person who violates KRS 230.070 or subsection (3) of KRS 230.080 shall be fined not more than one thousand dollars. In addition to the fine, he shall be imprisoned in the county jail for not more than one year or imprisoned in the penitentiary for not more than two years.

(2) Any person who violates KRS 230.090 shall, for each offense, be fined not more than five hundred dollars, or imprisoned for not more than six months, or both fined and imprisoned.

(3) Any person who violates subsection (2) of KRS 230.130 shall be fined not less than five hundred nor more than one thousand dollars for each day of the meeting or racing.

APPENDIX 4

CHAPTER 238

BINGO LICENSING

* * *

238.010 Definitions.

As used in this chapter:

(1) "Commissioner" shall mean the Commissioner of Revenue;

(2) "Organization" shall mean any organization licensed to hold, operate or conduct games under this chapter;

(3) "Person" shall mean not only a natural person but also any partnership, joint venture, association, corporation or any other legal entity;

(4) "Premises" shall mean any land, building, enclosure or part thereof used for the purpose of operating or conducting games under this chapter;

(5) "Rentor" shall mean and include the owner, lessor and supplier of premises furnished or supplied to, or used by, an organization for the purpose of holding, operating or conducting games under this chapter;

(6) "Rental" shall mean the amount paid or payable by an organization to a rentor for the use of premises including janitorial services, tables, chairs and other furnishings and fixtures rented, furnished or supplied to said organization for the purpose of holding, operating or conducting games under this chapter;

(7) "City" shall mean any incorporated city in a county having a population of 75,000 persons or more.

238.020 Adoption of chapter by local option.

The provisions of this chapter shall remain inoperative in any city of a county having a population of 75,000 persons or more unless and until the same shall be adopted by the legal voters of the city as herein provided.

238.030 Filing petition to put question on ballot.

The question of the adoption of the provisions of this chapter in the form set forth in KRS 238.040 shall be submitted to the legal voters of a city, if there shall be filed with the clerk of the county not less than forty-five days prior to a primary or general election of fifteen days prior to a special election, a petition calling for the submission of the question signed by at least 15 percent of the qualified legal voters of the city as evidenced by the total number of votes cast at the then next preceding general election in such city in such manner that every registered voter may vote at such election upon said question for or against such question.

238.040 Form of question on ballot; election costs.

(1) Said question to be voted upon shall be stated on the ballot without emblems and two spaces shall be left upon the right side of the ballot, one for votes favoring the proposition, to be designated by the word "Yes" and one for votes opposing it, to be designated by the word "No." The voter shall designate his vote by a cross mark placed opposite the word "Yes" or the word "No." In said election the form of the proposition shall be "Are you in favor of adopting the 'Bingo Licensing Act,' Chapter 238 of the Kentucky Revised Statutes, in the City of (name of city)?"

(2) The general election laws, including penalties for

violations, shall apply to the election, except where these laws are inconsistent with this chapter, and it shall be lawful for any city wherein this chapter is applicable to call a special election to present the question set forth in subsection (1) of this section.

(3) The cost of the election shall be borne by the city.

238.050 Effect of election.

If at any election at which such question is submitted as provided in this chapter the majority of all the votes cast, both for and against such question, shall be cast in favor of the question, the provisions of this chapter shall become operative in such city but if a majority of all such votes shall be cast against the question, the provisions of this chapter shall not become operative in such city unless the same shall be again submitted and this chapter shall be adopted as provided in this chapter.

238.060 Resubmission of question following rejection.

In event that in any city a majority of all the votes cast both for and against the question shall be cast against the question at any election at which said question is submitted, said question may again be submitted to the legal voters of the city at a primary or general election held not earlier than the date upon which the second primary or general election, following the date of the election at which the question was submitted, is to be held, if there shall be filed with the clerk of the county not less than forty-five days prior to such primary or general election a petition requesting the submission of the same signed by at least 15 percent of the legal voters of the city as evidenced by the total number of votes cast at the then next preceding primary or general election held therein.

238.070 Procedure for rescinding application of chapter.

If in any city in which the provisions of this chapter shall have become operative in the manner hereinbefore provided there shall be filed with the clerk of the county a petition signed by at least 15 percent of the qualified legal voters of the city, as evidenced by the total number of votes cast at the then next preceding general election in such city, rquesting that there shall be submitted to the voters of the city the question of rescinding the adoption of the provisions of this chapter by the city, the said question shall be submitted to the legal voters of the city at the next general election succeeding the forty-fourth day following the date of the filing of said petition.

238.080 Form of question in rescission election; election costs.

(1) Said question to be voted upon shall be stated on the ballot without emblems and two spaces shall be left on the right side of the ballot, one for votes favoring the proposition, to be designated by the word "Yes" and one for votes opposing it, to be designated by the word "No." The voter shall designate his vote by a cross mark placed opposite the word "Yes" or the word "No." In said election the form of the proposition shall be, "Are you in favor of rescinding the 'Bingo Licensing Act,' Chapter 238 of the Kentucky Revised Statutes, in the city of (Name of city or county)?"

(2) The general election laws, including penalties for violations, shall apply to the election, except where these laws are inconsistent with this chapter.

(3) The cost of the election shall be borne by the city.

238.090 Effect of election on recission.

If at such election a majority of all the votes cast, both for and against the rescission of the adoption of this chapter, in said city shall be cast in favor of the rescission thereof, the said adoption of this chapter shall thereby be rescinded and thereupon this chapter shall cease to be operative within such city and no petition shall be received for the submission of the question of the adoption of the provisions of this chapter to the voters of said city, and no such question shall be submitted to them, at any election earlier than the general election to be held in the second calendar year following the date of such election. If at such election the majority of all the votes so cast shall be against the rescission of said adoption, no petition for such submission of the question of the rescission of such adoption shall be received and no such question shall be again submitted at any election earlier than the general election to be held in the second calendar year following the date of such election.

238.100 Organizations and games which city may license.

It shall be lawful for the governing body of any city in a county having a population of 75,000 persons or more, at any time after this chapter shall become operative within such city and except when prohibited by this chapter, to license bona fide organizations or associations of veterans of any war in which the United States has been engaged, churches or religious congregations and religious organizations, charitable, educational and fraternal organizations, civic and service clubs, hospitals, and volunteer fire departments, to hold and operate games, restricted to the specific kind of game commonly known as bingo played for prizes with cards bearing numbers or other designations, five or more in one line, the holder covering numbers, as objects, similarly numbered, are drawn from a receptacle and the game being won by the person or persons who first cover a previously designated arrangement of numbers on such a card, and wherein the cards or tickets or rights to participate in such games are made available strictly on a voluntary donative basis and no cash payment or other consideration is required as a prerequisite to participate and by conducting the games accordingly, when the entire net proceeds of such bingo games are to be devoted to educational, charitable, patriotic, or religious uses, and for any such organization, association, church, congregation, society, club, hospital or fire department, when so licensed, to hold, operate and conduct such games by its active members pursuant to this chapter and such license, and under such conditions and regulations for the supervision and conduct thereof as shall be prescribed by rules and regulations duly adopted from time to time by the commissioner not inconsistent with the provisions of this chapter, but only when the entire net proceeds thereof are devoted to the uses aforesaid and for any person or persons to participate in and play such bingo games conducted under any such license.

238.110 Application for license.

(1) Each applicant for such a license shall file with the clerk of the city a written application therefor in the form prescribed in rules and regulations promulgated by the commissioner, duly executed and verified, in which shall be stated the name and address of the applicant together with sufficient facts relating to its incorporation and organization to enable the governing body of the city to determine whether or not it is a bona fide organization or association of veterans of any war in which the United States has been engaged or a church or a religious congregation or religious organization or a charitable, educational or fraternal organization, or a civic or service club, or a volun-

teer fire department; the names and addresses of its officers; the specific kind of games intended to be held, operated and conducted by the applicant and the place or places where, the date or dates and the time or times when, such games are intended to be held, operated and conducted, by the applicant, under the license applied for; the items of expense intended to be incurred or paid in connection with the holding, operating and conducting of such games and the names and addresses of the persons to whom, and the purposes for which, they are to be paid; the specific purposes to which the entire net proceeds of such games are to be devoted and in what manner; that no commission, salary, compensation, reward or recompense will be paid to any person for holding, operating or conducting such game or games or for assisting therein except as otherwise provided in this chapter and that no prize or aggregate of prizes will be offered and given under said license of a value in excess of the sum or value authorized to be offered and gven by this chapter and a description of all prizes to be offered and given in all such games to be held, and prizes shall be claimed only by persons physically present and personally participating in the game or games operated and conducted under such license and such other information as shall be prescribed by such rules and regulations.

(2) In each application there shall be designated an active member or members of the applicant organization under whom the game or games described in the application are to be held, operated and conducted and to the application shall be appended a statement executed by the applicant and by the member or members so designated, that he or they will be responsible for the holding, operation and conduct of such games in accordance with the terms of the license and the provisions of the rules and

regulations governing the holding, operation and conduct of such games and of this chapter, if such license is granted.

(3) In the event that any premises, upon which any such game is to be held, operated or conducted or which is to be used for any other purpose in connection with the holding, operating or conducting thereof, is to be leased from any person, persons or corporation, a written statement shall accompany the application signed and verified under oath by such person or persons or executed and verified under oath on behalf of such corporation, stating his or its address and the amount of rent which will be paid said premises and that such lessor or lessors, or if a corporation all of its officers and each of its stockholders who hold 10 percent or more of its stock issued and outstanding, are of good moral character and have not been convicted of a crime amounting to a felony or a misdemeanor involving moral turpitude.

238.120 City's investigation before granting license; maximum duration of license.

(1) The governing body of the city shall make an investigation of the qualifications of each applicant and the merits of each application, within fifteen days after the filing of the application, and if it shall determine that the applicant is duly qualified to be licensed under this chapter to hold, operate and conduct games under the provisions of this chapter and the rules and regulations governing the holding, operation and conduct thereof in the city; that the member or members of the applicant designated in the application to hold, operate or conduct the games, to hold, operate and conduct which the license is applied for, are bona fide active members of the applicant and are persons of good moral character and have never been convicted of crime; that such games are to be

held, operated and conducted in accordance with the provisions of this chapter and in accordance with the rules and regulations governing the holding, operation and conduct thereof and that the proceeds thereof are to be disposed of as provided by this chapter, and if the governing body is satisfied that no commission, salary, compensation, reward or recompense whatever will be paid or given to any person holding, operating or conducting or assisting in the holding, operation or conduct of such game except as in this chapter otherwise provided; and that no prize will be offered and given in excess of the sum or value of $1,000 in any single game, it shall issue a license to the applicant for the holding, operating and conduct of the specific kind of games applied for, accordingly, upon payment of a license fee or fees not to exceed $5 for each day upon which any game or games are to be conducted under such license.

(2) No license for the holding, operation and conduct of any game or games shall be issued under this chapter which shall be effective for a period of more than one year.

238.130 Hearing required before refusal of license; amendment of license.

(1) No application for the issuance of a license shall be refused by the governing body of a city until after a hearing is held on due notice to the applicant, at which the applicant shall be entitled to be heard upon the qualifications of the applicant and the merits of the application.

(2) Any license issued under this chapter may be amended, upon application made to the governing body of the city which issued it, if the subject matter of the proposed amendment could lawfully and properly have been included in the original license and upon payment of such

additional license fee, if any, as would have been payable, if it had been so included.

238.140 Form, contents, display of license.

Each license shall be in such form as shall be prescribed in the rules and regulations promulgated by the commissioner and shall contain a description of the kind of games authorized to be held, operated and conducted thereunder, a statement of the name and address of the licensee, of the names and addresses of the member or members of the licensee under whom such games will be held, operated and conducted, of the number of times, or the hours during which, such games are authorized to be conducted and the place or places where and the date or dates and time or times when, such games are to be conducted and of the specific purposes to which the entire net proceeds of such games are to be devoted; if any prize or prizes are to be offered and given in cash, a statement of the amounts of the prizes authorized so to be offered and given; and any other information which may be required by said rules and regulations to be contained therein, and each license issued for the conduct of any game or games shall be conspicuously displayed at the place where the same is to be conducted at all times during the conduct thereof.

238.150 City's control, supervision of games.

The governing body of any city issuing any license under this chapter shall have and exercise control and supervision over all games held, operated or conducted under such license, to the end that the same are fairly held, operated and conducted in accordance with the provisions of such license, the rules and regulations promulgated by the commissioner and the provisions of this chapter governing the holding, operation and conduct of the same and such governing body and the commissioner shall have power and authority to suspend any license issued by such governing body and to revoke the same, after hearing, for any violation of any such provision, and shall have the right of entry, by their respective officers and agents at all times into any premises where any such game is being held, operated and conducted or where it is intended that any such game shall be held, operated and conducted, or where any equipment being used or intended to be used in the conduct thereof is found, for the purpose of inspecting the same.

238.160 Minimum age of players.

No person under the age of eighteen years shall be permitted to participate in any game or games held, operated or conducted pursuant to any license issued under this chapter.

238.170 Persons permitted to conduct games; permissible expenses.

No person shall hold, operate or conduct any game or games under any license issued under this chapter except an active member of the organization, association, church, congregation, society, club, or fire department, to which the license is issued, and no person shall assist in the holding, operating or conducting of any game or games under such license except such an active member or a member of an organization or association which is an auxiliary to the licensee or a member of an organization or association of which such licensee is an auxiliary or a member of an organization or association which is affiliated with the licensee by being, with it, auxiliary to another organization or association and except bookkeepers or accountants as hereinafter provided, and no such game shall be conducted with any equipment except such as shall be owned absolutely or used without payment of any compensation therefor by the licensee, and no item of expense shall be incurred or paid in connection with the holding, operating or conducting of any game held, operated or conducted pursuant to any license issued under this chapter, except such as are bona fide items of reasonable amount for goods, wares and merchandise furnished or services rendered, which are reasonably necessary to be purchased or furnished for the holding, operating or conducting thereof, under any circumstances whatever; no rental shall be paid for the use of any premises for holding, operating or conducting any such game thereon or for any other purpose in connection with the holding, operating or conducting thereof unless the amount of such rental is stated in a statement annexed to the application for the license as provided in KRS 238.110 or which is in excess of the sum stated as the rental to be charged therefor in such a statement; and no commission, salary, compensation, reward or recompense whatever shall be paid or given, directly or indirectly, to any person holding, operating or conducting, or assistant in the holding, operating or conduct of, any game so held, operated or conducted, except that reasonable compensation may be paid to callers, floormen, waitresses, bookkeepers or accountants for bookkeeping or accounting services rendered or for any other services actually rendered according to a schedule of compensation which may be prescribed by order of the commissioner.

238.180 Advertising of games regulated.

No game to be conducted under any license issued under this chapter shall be advertised as to its location, the time when it is to be or has been played, or the prizes awarded or to be awarded, by means of newspapers, radio, television or sound truck, or by means of billboards, posters or handbills or any other means, addressed to the general public, except an announcement may be contained in a church bulletin or other similar club bulletin, and that one sign not exceeding sixty square feet in area may be displayed on or adjacent to the premises where the game will be played and an additional similar sign may be displayed on or adjacent to the premises where the prize or prizes are displayed and additional signs may be displayed upon any fire fighting equipment belonging to any licensee, which is a volunteer fire department, in and throughout the community or communities served by such volunteer fire department.

238.190 Required reports.

Within thirty days after the conclusion of the holding, operating and conducting of any such game the organization, association, church, congregation, society, club, hospital or fire department, which held, operated or conducted the same, and its members who were in charge thereof or upon such other periodic dates as the city ordinance may provide, shall furnish to the clerk of the city a duly verified statement showing the amount of the gross receipts derived from each game which shall include receipts from all donations and all other receipts connected with participation in said game or games, each item of expenses incurred, or paid, and each item of expenditure made or to be made, name and address of each person to whom each item has been, or is to be paid, with a detailed description of the merchandise purchased or the services rendered therefor, the net profit derived from each such game and the uses to which such net profit has been or is to be applied and a list of prizes offered and given, with the respective values thereof and it shall be the duty of each licensee to maintain and keep such books and records as may be necessary to substantiate the particulars of each such report.

238.200 Audit of licensees.

The governing body of the city and the commissioner shall have power to examine or cause to be examined the books and records of any organization or association, church, congregation, society, or fire department to which any such license is issued so far as they may relate to any transactions connected with the holding, operating and conducting of any game thereunder and to examine any manager, officer, director, agent, member or employe thereof under oath in relation to the conduct of any such game under any such license but any information so received shall not be disclosed except so far as may be necessary for the purpose of carrying out the provisions of this chapter.

238.210 Appeal from city's action.

Any applicant for, or holder of, any license issued or to be issued under this chapter aggrieved by any action of the governing body of the city to which such application has been made or by which such license has been issued, may appeal to the commissioner from the determination of said governing body by filing with the governing body a written notice of appeal within thirty days after the determination or action appealed from, and upon the hearing of such appeal the evidence, if any, taken before the governing body and any additional evidence may be produced and shall be considered in arriving at a determination of the matters in issue, and the action of the commissioner upon said appeal shall be binding upon said governing body and all parties to said appeal.

238.220 Immunity of licensed games.

No person or corporation:

(1) Lawfully conducting, or participating in the conduct of,

(2) Possessing, transferring or in any manner disposing of, any cards, tickets or equipment used to participate in, or

(3) Permitting the conduct upon any premises owned by him or it, of,

any game conducted or to be conducted under any license lawfully issued pursuant to this chapter, shall be liable to prosecution or conviction for violation of any provisions of KRS Chapter 436, but this immunity shall not extend to any person or corporation knowingly conducting or participating in the conduct of any game under any license or otherwise, or possessing, transferring or disposing of cards, tickets or equipment used to participate in, or permitting the conduct upon any premises owned by him or it of any game conducted under any license known to him or it to have been obtained by any such false pretense or statement.

238.230 Renting premises.

An organization may, for the purpose of holding, operating and conducting games under this chapter, rent or use premises not owned by such organization upon compliance with the provisions of this chapter. No such rental or use shall be permitted unless the governing body of the city shall determine that the payment to be made for such rental or use of the premises is fair and reasonable and that the rentors of said premises are approved rentors under this chapter.

238.240 Approval required for rentor.

From and after June 18, 1970, no person shall act as, or be, a rentor unless said person

(1) Is itself licensed to hold, operate or conduct games under this chapter or

(2) Has first obtained from the governing body of any city a license as an approved rentor.

238.250 Application for rentor's license.

A person seeking a license as an approved rentor shall file in the office of the city clerk a written application for such license. The application shall specify the premises to be rented and be in such form and require such information as the governing body of any city shall deem necessary for the purpose of effectuating the provisions of this chapter.

238.260 Restrictions on granting of rentors' license.

No license as an approved rentor shall be granted:

(1) If any person whose signature or name appears in the application is not the real party in interest or if the person so signing or named in the application is an undisclosed agent or trustee for any such real party in interest; and,

(2) Unless the governng body of any city shall determine that

(a) The applicant, and

(b) If the applicant is not the owner, the owners of said premises, and

(c) If said applicant or owner is a corporation, all of its officers and each of its stockholders who owns 10 percent or more of its issued and outstanding stock, are of good moral character and have not been convicted of a crime amounting to a felony or a misdemeanor involving moral turpitude.

238.270 Fee for rentor's license; temporary permit.

When the application shall have been examined and such further inquiry and investgaton made as the governing body of any city shall deem proper and when the governing body of any city shall be satisfied therefrom that the persons named in subsection (1) of KRS 238.260 possess the qualifications prescribed in this chapter, the governing body of any city shall issue and deliver a license to such applicant as an approved rentor for the premises stated in the application upon payment by the applicant of a license fee of $100. Said license shall be valid until revoked, suspended or modified by the commissioner. The governing body of any city may issue a temporary permit to any applicant for such license pending final action on the application. Any such temporary permit shall be valid for a period not in excess of sixty days.

238.280 Suspension or revocation of rentor's license.

Any license as approved rentor issued pursuant to this chapter may be revoked or suspended for such period as the governng body of any city or the commissioner deems in the public interest for any of the following offenses on the part of the licensee, its agent or employes, or any person required by this chapter to sign or be identified in an original application for a license:

(1) Any cause which would permit or require disqualification of the licensee from receiving a license upon original application;

2) Fraud, deceit or misrepresentation in securing the license or in the conduct of the licensed activity or in connection with any application submitted to, or any inter-

view, hearing or proceeding conducted by the commissioner;

(3) Failure by the licensee to maintain a complete set of books and records containing a true and accurate account of the licensee's receipts and disbursements arising out of his activities;

(4) Failure to keep said books and records available during business hours for inspection by the commissioner and his duly designated representative until the expiration of the second calendar year following the calendar year during which occurred the transactions recorded therein;

(5) Violation of any provisions of this chapter, or the rules and regulations adopted by the commissioner.

238.290 City's regulatory power; limitations thereon.

The governing body of any city shall have power to make and enforce such reasonable rules and regulations as it may deem necessary to effectuate the provisions of this chapter and the powers conferred upon it hereunder and to prevent the circumvention or evasion thereof. Said rules and regulations may, among other things, require that all rental or use agreements be in writing and in form approved by the governing body of any city and may provide for the form of application and the information to be furnished the governing body of any city on any application for approval, but shall not impose limitations on the number of days a month the premise may be used for purposes authorized by this chapter.

238.300 Accounting of money spent for rent.

No agreements or arrangements for the rental or use of premises shall be valid and no moneys paid by licensed organizations for such rental or use or services shall be allowable expenditures or be taken into account in determining net proceeds unless made in accordance with the provisions of this chapter and of the rules and regulations adopted by the commissioner pursuant thereto.

238.310 General duties of commissioner.

It shall be the duty of the Commissioner of Revenue to supervise the administration of this chapter and to adopt, amend and repeal rules and regulations governing the issuance and amendment of licenses thereunder, the holding, operating and conducting of bingo games under such licenses which shall have the force of law and shall be binding upon all cities issuing licenses under this chapter and upon all licenses thereunder to the end that such licenses shall be issued to qualified licensees only and that said bingo games shall be fairly and properly conducted for the purposes and in the manner in which this chapter prescribes and to prevent the bingo games authorized to be conducted by this chapter from being conducted for commercial purposes instead of for the purposes authorized in this chapter, and in order to provide uniformity in the administration of this chapter throughout the state, the commissioner shall prescribe forms of applications for licenses, licenses, amendment of licenses, reports of the conduct of games and other matters incident to the administration of this chapter.

238.320 Filing regulations.

A copy of every rule and regulation adopted and promulgated by the commissioner shall be filed in the office of the Legislative Research Commission, pursuant to KRS Chapter 13, before it shall become effective and copies thereof shall be made available to the various cities operating under this chapter.

238.330 Duty to police law.

The commissioner shall conduct investigations of the administration of this chapter in such of the cities of this state as he shall deem desirable which shall serve to furnish a cross section of all of the cities operating under this chapter in this state and shall receive and investigate complaints as to violations and evasions of this chapter in any city or cities.

238.340 Commissioner's power to revoke or suspend licenses, institute prosecutions, hear appeals.

(1) The commissioner shall have power to suspend and revoke licenses, after hearing, for violation of this chapter under which the license is issued or for violation of any provision of the rules and regulations adopted and promulgated by the commisisoner pursuant hereto.

(2) The commissioner shall have power to institute prosecutions, in a court of competent jurisdiction, for the punishment of violations of this chapter.

(3) The commissioner shall hear appeals from the determinations and action of the city governing bodies in connection with the refusal to issue licenses and the suspension and revocation of licenses in the manner prescribed in this chapter and the action and determination of the commissioner upon any such appeal shall be binding upon the city governing body and all parties to the appeal.

238.350 Commissioner to study bingo law in this, other states.

(1) It shall be the duty of the commissioner to carry on continuous study and investigation of the operation of this chapter and the administration thereof by the several cities of the state, throughout the state, for the purpose of

ascertaining from time to time any defects in this chapter which may be discovered, by reason whereof any abuses in the administration thereof and any evasions of the terms thereof may arise or be practiced, and for the purpose of formulating and recommending improvements and changes in this chapter and in any other laws of the state, which the commissioner may determine to be desirable to prevent such abuses and evasions and to guard against the use of said laws as a cloak for the carrying on of organized gambling and crime, and to insure that said laws shall be in such form and be so administered as to serve the true purposes for which they were enacted, namely the operation and conduct of the games therein described for educational, charitable, patriotic, or religious uses only.

(2) The commissioner shall make a continuous study and investigation also of the operation and administration of similar laws which may be in effect in other states of the United States, and of any literature on the subject which from time to time may be published or be available.

238.360 Commisisoner's power to issue subpoena; immunity of witnesses from prosecution, arrest.

(1) The commissioner may hold investigations and hearings and shall have power to compel the attendance of witnesses, the production of books and documents relating to transactions connected with the holding and conducting of bingo games under this chapter, and transactions relating thereto, by the issuance of subpoena signed by the commissioner, which may be served by any competent officer.

(2) No person shall be excused from testifying or producing any book or document in any investigation or hearing, when ordered so to do by the commissioner holding the same, upon the ground that testimony or documentary evidence required of him may tend to incriminate or sub-

ject him to penalty or forfeiture, but no person shall be prosecuted, punished, or subjected to any penalty, or forfeiture on account of any matter or thing concerning which he shall, under oath, have testified to or in support of which he has produced documentary evidence, except that he shall not be exempt from prosecution or punishment for any perjury committed by him in his testimony.

(3) A witness shall be privileged from arrest, in all civil actions and no other, during necessary attendance before the commissioner, at any place required by subpoena previously duly served, and during his going to and returning therefrom.

238.370 Enforcement of subpoena by circuit court.

(1) If a person subpoenaed to attend in any such investigation or hearing fails to obey the command of the subpoena without reasonable cause, or if a person in attendance in any such investigation or hearing refuses, without lawful cause, to be examined or to answer a legal or pertinent question or to exhibit any book, account, record, or other document when ordered so to do by the commissioner holding such investigation or hearing, the commissioner may apply to any judge of the circuit court, upon proof by affidavit of the facts, for an order returnable in not less than two nor more than ten days directing such person to show cause before the judge why he should not comply with such subpoena or such order.

(2) Upon return of the order, the judge before whom the matter shall come on for hearing shall examine such person under oath, and if the judge shall determine, after giving such person an opportunity to be heard, that he refused without legal excuse to comply with such subpoena or such order of the commissioner holding such investigation, the judge may order such person to comply there-

with forthwith and any failure to obey the order of the judge may be punished as a contempt of the circuit court.

238.380 Administrative expenses.

The commissioner is authorized to incur such necessary expenses, and engage clerical and stenographic assistants and investigators, as he may deem necessary to the proper performance of the purpose of this chapter.

238.390 City's report to commissioner.

Each city, in which this chapter shall be adopted, shall file with the commissioner a copy of each ordinance enacted pursuant thereto within ten days after the same is adopted, and on or before February 1 of each year, and at any other time or times which the commisisoner may determine, shall report to the commissioner of the number of licenses issued therein under this chapter, the names and addresses of the licensees, the aggregate amount of license fees collected, the names and addresses of all persons detected of violation of this chapter or of the rules and regulations adopted by the commissioner pursuant hereto, and of all persons prosecuted for such violations and the result of each such prosecution, and the penalties imposed therein, during the preceding calendar year, or the period for which the report is required, which report may contain any recommendations for improvement of this chapter or the administration thereof, which the governing body of the city shall deem to be desirable.

238.400 Commissioner's report to Governor.

The commissioner shall report to the Governor annually with his recommendations, if any, and if in the meantime he shall discover any matters which shall require change in this chapter, in order to prevent abuses and evasions thereof or rectify undesirable conditions in connection with the administration thereof.

238.410 Citation of chapter.

This chapter shall be known as and may be cited as the "Bingo Licensing Act."

238.990 Penalties.

(1) Any person participating in or conducting bingo games or aiding or abetting bingo games or leasing, owning or renting premises used for conducting bingo games which are not operated within the provisions of this chapter shall be subject to the provisions of KRS Chapter 436.

(2) Any bingo game not conducted under the provisions of this chapter shall be a lottery and shall be considered in violation of KRS Chapter 436.

(3) Any person signing, or aiding and abetting the signing or filing of, or conspiring to, or causing to be filed a false statement in order to conduct bingo games under the provisions of this chapter shall be fined not less than $50 nor more than $500.

APPENDIX 5

436.360 [2573] **Lotteries and gift enterprises; "chain" merchandising; injunctive relief; civil penalties.**

(1) Any person who sets up, conducts, manages, operates, draws or otherwise promotes or assists in setting up, conducting, managing, operating, drawing or in otherwise promoting any lottery or gift enterprise, whereby money or anything of value is or is pretended to be disposed of, or any person who writes, prints, sells, exchanges, disposes of, supplies or procures or causes to be supplied or procured, to or for any person, or has in his possession or under his control, with intent, for himself or another, to sell, exchange, dispose of or supply any ticket, share or part of a ticket, or any writing, print, paper, certificate, token or device purporting, designed or intended to give or entitle the holder or any other person to any prize, share or interest in any prize, or to any right, share or interest whatever in any lottery or gift enterprise in or out of this state or in or to any drawing of or in or to the result of any lottery or gift enterprise in or out of this state shall be fined not less than five hundred dollars nor more than five thousand dollars, and shall be confined in the penitentiary for not less than two nor more than five years.

(2) Any person who sets up, promotes or engages in any plan by which merchandise or anything of value is sold to a person, firm or corporation for a consideration and upon the further consideration that the purchaser agrees to secure one or more persons to participate in the plan by respectively making similar purchase or purchases and in turn agreeing to secure one or more persons likewise to join in said plan, each purchaser being given the right to secure money, credits, goods or something of value, de-

pending upon the number of persons joining in the plan, shall be held to have set up and promoted a lottery and shall be punished as provided in subsection (1).

(3) The circuit court of any county in which any plan described in subsection (2) is proposed, operated or promoted may grant an injunction without bond, upon complaint filed by the Attorney General to enjoin the further operation thereof, and the Attorney General may ask for and the court may assess civil penalties against the defendant in an amount not to exceed the sum of $5,000 which shall be for the benefit of the Commonwealth of Kentucky.

* * *

436.370 [2574] Permitting premises to be used for lottery or gift enterprise.

Any person who permits the commission of any of the offenses prohibited by KRS 436.360, in any building owned, occupied or controlled by him, or rents or gives control of any building or any part of it, with knowledge or for the purpose that any of the offenses prohibited by KRS 436.360 are to be committed there, shall be fined not less than five hundred dollars nor more than five thousand dollars, and shall be confined in the penitentiary for not less than two nor more than five years.

436.380 [2575] Procuring lottery ticket.

Any person who procures for himself any lottery or gift enterprise ticket, or other token, device or thing prohibited by KRS 436.360, shall be fined not less than twenty-five dollars nor more than one hundred dollars.

* * *

436.390 [2576] **Prohibition of fictitious lotteries.**

The provisions of KRS 436.360, 436.370 and 436.380 shall apply to pretended or fictitious lotteries or gift enterprises, as well as to real lotteries or gift enterprises.

436.400 [2579] **Buyer of lottery ticket may testify against seller.**

The buyer of any lottery ticket or any device in the nature of a lottery ticket shall be a competent witness in any prosecution against the seller of the ticket.

436.410 [2557; 2580] **Indictment in lottery cases.**

(1) Any indictment found under KRS 436.360 to 436.-400 shall be held good if it charges the offense in the language of the particular section. It need not set forth the number, date or other description of the ticket or device or the name of the lottery or gift enterprise.

(2) An indictment may charge in one count the commission of any number of the offenses mentioned in KRS 436.360 and 436.370.

* * *

436.420 [1314; 1316] **Advertising lotteries in newspapers and magazines.**

(1) The publisher or owner of any newspaper, magazine, sheet or periodical published and circulated in this state which prints or publishes, any advertisement of any lottery, drawing or scheme of chance or any announcement indicating where any ticket or chance thereon can be procured, or which prints, advertises, circulates or publishes any matter, announcement or statement in anywise concerning any lottery, drawing or scheme of chance, whether

it is an advertisement of a lottery, drawing or scheme of chance that will occur in the future, that has occurred in the past or that it is usual or customary to hold at any given time, and whether the lottery, drawing or scheme of chance is held in this state or elsewhere, or which prints, advertises, circulates or publishes any announcement or statement of the result, in whole or in part, of any lottery, drawing or scheme of chance, shall be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned for not less than thirty nor more than sixty days.

(2) If a newspaper, magazine, sheet or periodical which prints or publishes matter prohibited by subsection (1) of this section is owned by a corporation, the corporation shall be fined as provided in subsection (1) of this section, and either the president or the managing officers of the corporation, or both, shall be imprisoned as provided by subsection (1) of this section in the case of an individual.

436.430 [1315; 1317] Selling paper containing lottery advertisement.

Any person who sells or offers for sale or circulates or distributes any written or printed matter in this state containing any advertisement, announcement or statement prohibited by KRS 436.420, shall be fined not less than three hundred dollars nor more than one thousand dollars, and imprisoned for not less than ten nor more than thirty days. Each sale or offering for sale shall be regarded as a separate offense.

436.440 [3914b-1; 3914b-3] Keeping or leasing premises where bets are placed on races or other contests.

(1) Any person who provides, manages, maintains or keeps any room, building, float, vessel or premises, or aids

and abets others in so doing, in which persons assemble to wager money or anything of value on the result of any horse race or other contest of man or beast to be decided in or out of the state, or advertised or reported as having been or to be run, or in which any money is wagered or received and deposited to be transmitted elsewhere to another to wager, or in which any money or other thing of value is received or paid for any ticket, lot, pool or chance on the result of such a race or contest held or to be held in or out of the state, or advertised or reported as having been held or to be held, shall be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned for not less than six nor more than twelve months.

(2) Any person who, either as owner or agent, leases or rents to any other person, any room, building, float, vessel or premises, to be used for any the purposes described in subsection (1) of this section, or permits it to be used for such purposes, shall be fined not less than one thousand dollars nor more than five thousand dollars.

(3) Each day that the room, building, float, vessel or premises is provided, managed, maintained, kept or used shall constitute a separate offense.

* * *

436.450 [3914b-2] **Acting as agent or employe of another in keeping premises where bets are placed on races or other contests.**

Any person who acts as the agent or employe of any other person in establishing, setting up, maintaining, keeping, operating or conducting any room, building, float, vessel or premises of the kind referred to in KRS 436.440 shall be confined in the county jail for not less than six months nor more than one year. Each day any person assists in maintaining, keeping, operating or conducting such a room, building, float, vessel or premises or acts as agent or employe of any other person in maintaining, keeping, operating or conducting it, shall constitute a separate offense.

436.460 [3914b-4] Assembling on premises where bets are placed on races or other contests.

Any persons who assemble for any purpose referred to in KRS 436.440 in any room, building, float, vessel or premises shall be imprisoned for not less than ten nor more than thirty days.

436.470 [3914b-5] Peace officer to suppress places where bets are placed on races or other contests.

Any peace officer who willfully fails to suppress any room, building, float, vessel or premises in which the provisions of KRS 436.440 are being violated or to arrest violators of the provisions of KRS 436.440 shall be imprisoned for not less than six nor more than twelve months. In addition, a peace officer convicted under this section shall forfeit his office and shall be ineligible to hold any other office in the gift of this state.

436.480 [3914b-6] Authorized race meetings exempt from KRS 436.440 to 436.470.

KRS 436.440 to 436.470 shall not apply to enclosures during regular race meetings or enclosures in which horse racing is being conducted under license from the State Racing Commission, or to enclosures during regular race meetings in which trotting and pacing horses are being conducted by associations regularly organized for that purpose.

* * *

436.490 [1328a] **Betting on or transmitting bets on horse races other than authorized Kentucky races.**

(1) Any person who, either for himself or as agent or employe of another, wagers money or anything of value on a horse race run or about to be run or advertised, posted or reported as being run at any race track in or out of this state, or who engages in the occupation of receiving, making, transmitting or negotiating, either in person or by messenger, telephone or telegraph, wagers on horse races run or about to be run or advertised, posted or reported as being run or about to be run at any race track in or out of the state, shall, except in the case of wagers made within the enclosure of a race track licensed by the State Racing Commission during an authorized race meeting at that track, or an enclosure during regular meetings in which running, trotting or pacing races are being conducted by associations regularly organized for that purpose, be imprisoned for not less than one nor more than twelve months.

(2) In any prosecution under subsection (1) of this section, the state need not prove that the horse race upon which the wager was placed was actually run. Proof that the wager was made upon what purported to be or what was advertised, reported or understood to be a horse race shall be sufficient to establish a prima facie case for the state.

* * *

APPENDIX 6

MOTION TO INTERVENE AS DEFENDANTS

(Filed July 13, 1970)

William "Bill" Otto, a citizen, resident of, and a taxpayer in the City of Newport, Campbell County, Kentucky:

1) Individually and as such citizen, resident and taxpayer;

2) As General Chairman and Chairman of Public Relations and for and in behalf of a voluntary, unincorporated association known as "LEGALIZE BINGO," whose Committees consist of: Bill Otto, General Chairman and Public Relations; Robert Bowlds, Co-Chairman and Treasurer, and representing James Costigan American Legion Post; Ann Strickley, Secretary, and representing Lawler-Hanlon VFW Auxiliary; Christine Wright, Assistant Secretary, and representing Ranklin-Prout VFW Auxiliary; Edward Hesch, TV Programs, and representing James Wallace Costigan American Legion Post; Frank Schwed, Sergeant at Arms, and representing James Wallace Costigan American Legion Post; William Moore, Events and Radio; Anthony Warndorf, Campaign Buttons; Brenda Gayle Campbell, Mailing; and whose Directors are: Richard Herrick, representing James Wallace Costigan American Legion Post; Robert Brewster, representing Brighton Center; Mabel Standerford, representing American Legion Auxiliary Post No. 11; Edward C. Hesch, representing Costigan Post No. 11 American Legion Mildred Preston, representing Newport Independent Order of Shepherds No. 1; Viola Crail, representing Independent Order of Herdsman; Christine Wright, representing Rankin-Prout No. 1404 VFW; Emma Eschan, representing New Women's Democratic

Club; Ann Strickley, representing DAV Auxiliary No. 37 and Lawler-Hanlon VFW Auxiliary; Louise Lehew, representing Mixed Democratic Club and DAV Auxiliary No. 37; Ida Mae Harker, representing Golden and Grandmothers No. 229; Ethel A. Steil, representing Campbell County Gold Star Mothers; Ruth Collins, representing Grand Tower Jolly Seniors; Ed Harden, representing Newport Eagles No. 280; Paul Staffen, representing St. Therese Church; Mrs. John Grant, representing Project Social Newport Housing; Mrs. James Dean, Mrs. Robert Griffin, representing Project Social Newport Housing; Ann Middough; Larry Connett, representing Catholic Order of Forresters No. 1380; Jackie Griffin; Ed. Limeman; Bob Brewster, representing Brighton Street Center; William Horn; Freddie O. Highhouse; Mrs. Louise Hunt, representing James Wallace Costigan Unit No. 11; Harold Ehert; Earnest Harris; Mary Prewitt; Adele B. Leight;

3) For and upon belief of the 1847 persons who signed petitions stating that they were qualified voters of the City of Newport, Kentucky, and who by such petitions requested the Board of Commissioners of the City of Newport, Kentucky, to call a Special Election to submit to the voters of the City of Newport, Kentucky, the question of the adoption of the "Bingo Act" being Chapter 238 of the Kentucky Revised Statutes, which petitions 92 in number, were filed with defendant, Robert T. Nau, as Clerk of the Campbell County Court, on June 25, 1970, and a photocopy with the Clerk of the City of Newport, Kentucky, on June 26, 1970; and

4) For and upon behalf of all others similarly situated and having an interest in the adoption of the Bingo Licensing Act in the City of Newport, Kentucky, said persons constituting a class so numerous to make it impossible to bring them all before the Court; and moves the Court for leave to intervene as defendants in this action, in order to assert

the defenses set forth in the proposed answer, a copy of which is hereto attached, on the grounds:

1. They have and claim an interest relating to the transaction and matter which is the subject of the action; and they are so situated, neither one or more than one of them having been made a party as an individual, individuals, or as representatives of a class, that the disposition of the action may as a practical matter impair or impede his, or their ability to protect that interest, and the interest they have or claim not being adequately represented by existing parties;

2. The claim or defense and the main action (Complaint for Declaratory Judgment) have a question of law or fact in common.

(s) Donald L. Johnson
Lawyers Bldg.
Newport, Kentucky 41071

(s) Morris Weintraub
504 Campbell Towers
Newport, Kentucky 41071
Attorneys for Applicants

APPENDIX 7

ORDER SUSTAINING MOTION TO INTERVENE AS PARTY DEFENDANTS

(Filed July 13, 1970)

This matter coming on to be heard on the motion of William "Bill" Otto, as a citizen, resident and taxpayer of the City of Newport, Kentucky, individually, and for and on behalf of others, who are set forth, described and designated in said Motion, and who are too numerous as to make it impracticable to bring them all before the Court;

And the Court being informed, determines and finds:

1. That applicant has an interest relating to the transaction which is the subject of the action, and is so situated, neither he nor members holding opposing claims to that set forth in the action having been made parties defendant, that the disposition of the action may as a practical matter impair or impede their ability to protect that interest;
2. That because of the failure to include defendants who, by counsel, will present the other side of the issues, said issues cannot, therefore, be fully, fairly and adequately defended and presented, unless new and additional parties are made defendants to this action who will do so;
3. That applicant is a proper person who will fully, vigorously and adequately defend and present the other side of the alleged controversy, and will adequately, fully and vigorously defend the interests of all other persons similarly situated, so that this case will not be a "friendly" suit, and that he, therefore, should be made a new party-defendant to this action;

It is, Therefore, Ordered that the Motion to Intervene be, and the same hereby is, sustained, and leave is hereby given William "Bill" Otto, a citizen, resident and taxpayer of the City of Newport, Kentucky, for himself as such, and for and in behalf of the parties and persons mentioned and set forth in his Motion, and all other similarly situated, to intervene as a new PARTY-DEFENDANT and leave is further given him to file an ANSWER, a copy of which was attached to said Motion.

(s) Paul J. Stapleton
Judge,
Campbell Circuit Court
Division No. Two

APPENDIX 8

EXCERPT FROM PETITIONER'S BRIEF TO COURT OF APPEALS ON ORIGINAL APPEAL

II. KRS Chapter 238, the Bingo Licensing Act, is Not Violative of the Kentucky Constitution.

Appellees suggested various alleged constitutional deficiencies to the trial court; however, the judgment of the Court declaring the Bingo Licensing Act unconstitutional dealt exclusively with Section 226 of the Kentucky Constitution which provides that, "Lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and none shall be exercised, and no schemes for similar purposes shall be allowed. The General Assembly shall enforce this Section by proper penalties. All lottery privileges or charters hereto granted are revoked." It is immediately apparent that the issue presented involves the determination of the meaning of the word "lottery." Neither the constitution nor statutes of the Commonwealth of Kentucky furnish any such definition.

The leading Kentucky case concerning the construction of the word "lottery" and which Appellant believes sets a solid precedent for the validity of the Bingo Licensing Act is the landmark case of *Commonwealth* v. *Kentucky Jockey Club, et al.,* 238 Ky. 739, 38 S. W. 2d 987 (1931). In that case the Kentucky Court of Appeals upheld the Kentucky Statutes permitting betting on race horses through the use of pari-mutuel pools at certain race tracks in the Commonwealth of Kentucky as not being violative of Section 226 of the Constitution. After first giving a very interesting and informative history of the course of the legislation and decisions pertaining to horse racing and the lottery prohibitions, the Court held that Section

226 did not prohibit the legislature from controlling betting on horse races *and other forms of betting.* In order to determine the intent of the framers of the constitution the Court necessarily referred to the debates on the constitution at the time Section 226 was being first considered, and stated at page 993:

> "At the time Section 226 was being considered in the convention that framed the constitution, an amendment was proposed forbidding every species of gambling. Volume 1. Debates of Constitutional Convention p. 1172. The delegate who proposed the amendment was asked whether his proposition embraced the prohibition of betting upon the speed of horses, to which he responded that it was his purpose to forbid all species of gambling and all games of chance in every conceivable form. He argued that all gambling was equally wrong and that it was unfair to denounce gambling in the form of a lottery and to countenance it in other forms, such as betting upon horse races and the like. The delegate from Lexington argued that it was not the appropriate place to deal with pooling privileges upon race courses *and other forms of gambling,* because lotteries theretofore had been licensed by the legislature, and the object of the pending section was not to deal with any other species of gambling, but to prohibit the legislature from granting licenses to lotteries. The amendment was rejected, thus indicating that it was the intention of the convention not to include in Section 226 anything but lotteries of the type familiar at the time."

According to one recognized authority, the game of bingo was not generally played in the United States until 1928. Scarne, Complete Guide to Gambling, p. 185 (Simon and Schuster, 1961).

The Court in the Kentucky Jockey Club case recognized that certain forms of gambling were never considered by "anyone" as being a lottery for many years prior to the adoption of our present constitution, stating at page 993:

> "It did not occur to anyone during that period that betting on races, elections or similar forms of wagering constituted a lottery. Indeed, the contention that betting on horse races by a pari-mutual system constitutes a lottery is of recent origin in this state. For nearly half a century, the General Assembly and the Court of Appeals have proceeded upon the general understanding that the whole subject of betting and gaming was within the power of the legislature to prohibit, regulate, or classify, prohibiting in part and permitting in part according to its view of the public policy to be enforced."

The Court having unequivocally held in the Kentucky Jockey Club case that Section 226 does not outlaw "betting upon horse races, by the pari-mutuel system or other forms of betting" (page 994), and having held that these subjects were definitely within the police power possessed by the legislature, this construction should be considered an actual part of the Constitution since this holding has been accepted and acquiesced in for many years. *Schamburger* v. *Duncan,* 253 S. W. 2d 388 (1952).

Commonwealth v. *Kentucky Jockey Club* has never been overruled and is still good law. It was sufficient authority upon which the Kentucky General Assembly could rely in enacting the Bingo Licensing Act. Obviously, the Bingo Licensing Act cannot be declared in violation of Section 226 unless *Commonwealth* v. *Kentucky Jockey Club* is overruled. It should also logically follow that since the Kentucky General Assembly was empowered in 1893 to exempt pari-mutuel betting on horse races, it certainly was empowered in 1970 to legalize bingo. This conclusion is not only logical but is required by precedent. Furthermore, the Kentucky Legislature in adopting the Acts exempting betting on horse races necessarily involved a legislative construction of the definition of "lottery" as not outlawing all gambling. Such legislative construction of a Constitutional provision particularly where such provision is susceptible of more than one meaning and which has been acquiesced in by the people for many years, is entitled to great weight. *Coleman* v. *Mulligan,* 234 Ky. 691, 28 S. W. 2d 980 (1930). The Court in the *Kentucky Jockey Club* case clearly held in effect, that the word "lottery" may have more than one reasonable meaning. This principle was also recognized by the Supreme Court of Florida in a case quite favorable to Appellant Otto, namely, *Greater Loretta Improvement Association* v. *State ex rel. Boone,* Fla., 234 S. 2d 665 (1970). This case involved an attack on a bingo act for allegedly violating an anti lottery provision of the Florida Constitution. The Florida Supreme Court held at page 669 therein as follows:

> "The situation then, as it presents itself in connection with our constitutional provision, is at least that by the decisions of the Courts of Florida and other jurisdiction the word 'lottery' may have either of several meanings, and that either is reasonable and possible. In such a situation, where a constitutional provision may well have either of several meanings, it is a fundamental rule of constitutional construction that, if the legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling."

See also 16 Am. Jur. 2d Constitutional Law, Section 85, pages 268-269 and 16 CJS, Constitutional Law, Section 33, pages 109-111. The Florida Supreme Court in the Greater Loretta Improvement Association case held that pari-mutuel pools as that term is applied to horse racing, jai alai and dog racing *includes bingo by definition,* holding at page 671 as follows:

> "Although the term pari-mutuel is usually considered a method of betting on horse racing, it should be noted that this form of betting has been authorized for dog racing and jai alai. At the horse tracks, dog tracks and frontons, all the money paid for gambling tickets are placed in a common fund and paid to the winners less certain portions reserved for taxes to the state and fees due the track or fronton for operating expenses and for profit. The greater the amount invested in tickets, the greater amounts one may win if his choice is correct.
>
> *"Bingo is similar.* The player may usually purchase and play on as many cards as may be desired. The greater amount invested in cards the greater the chance of winning. In both racing events and in bingo games, the hope of winning money prizes is not the only motive for attendance. In both instances, entertainment, recreation, and social relations are factors of concern to many and just as important as the process of participating in the betting." (Emphasis added.)

and the Florida Supreme Court, continuing at page 672 further stated:

> ". . . The pros and cons of the moral issues involved in bingo is a matter of legislative, not judicial concern. We are only confronted with the possible violation of our organic law. For the reasons stated above, it does not appear that the members of the legislature, who are directly responsible to the people, violated the provisions of the Constitution in authorizing and regulating the game of bingo . . ."

Bingo has also been declared to be a type of "gaming" which is not a "lottery" by the Court of Appeals of Maryland. In the case of *Bender, et al.* v. *Arundel Arena, Inc., et al.,* Md., 236 A. 2d 7 (1967), the Court held at page 13:

> "All lottery is a form of gambling but all gambling need not be legislatively considered to be or actually

> be lottery, and although some, perhaps many, gambling games, including machines and bingo, have elements of lottery that have not been considered as coming or held to come within the purview of the lottery statutes. We think likewise that the legalization of the gambling games herein involved was not forbidden by the command of Art. III, Section 36 of the Constitution of Maryland, that: 'No lottery grant shall ever hereafter be authorized by the General Assembly.' "

Appellees will probably suggest to this Court that bingo was allegedly designated a lottery in the case of *A. B. Long Music Co.* v. *Commonwealth,* Ky., 429 S. W. 2d 391 (1968). However, a careful reading of the *Long* case, indicates that pinball machines and not bingo was the subject matter before the Court. Moreover, that case did not involve any legislative act purporting to authorize or license any gaming, or betting device or otherwise, and the case can only stand for the clear holding of the court that coin operated pinball machines may be used for gambling purposes and that such use of pinball machines is unlawful.

In the case of *Jamestown Lions Club* v. *Smith,* 66 Oh. Law Abs. 45 (Com. Pl. 1951), the Court upheld Section 13064 Ohio General Code, effective September 21, 1943, which removed the penalty under the then existing lottery statute where the games, including bingo, were for charitable purposes or public benefit causes, holding that the statute did not violate the Ohio Constitution, Art. 15 Section 6 which provides: "Lotteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this state." The Ohio Court in concluding that the aforementioned General Code provision was not in violation of the Ohio Constitution lottery prohibition made the following appropriate remark:

> "In passing, the Court might make the observation that when bingo and other games of chance are conducted by clubs, lodges, societies, or churches for the benefit of charitable purposes and public benefit causes, they do no harm; in fact, they may do a great deal of good; and if some of the people who are so exercised in stopping church bingo games were as much exercised in bringing peace to the world, they might accomplish something."

KRS 238.100 and 238.170 provide that licenses may be issued for the conducting of bingo games only to bona fide charitable, religious and other specific organizations, and other provisions of Chapter 238 provide for policing the operation of bingo games so that commercialized gambling may be completely avoided while allowing a recreational and socially acceptable method for charities, religious and specifically enumerated organizations to raise much needed funds. The Kentucky Legislature manifestly had in mind the granting of a privilege to purely charitable, religious and specifically enumerated organizations operating not for a profit.

Appellant respectfully submits that it cannot in good conscience be argued that pari-mutuel horse betting is not so affected by the elements of chance and just plain hazard as to not constitute gambling or a gamble. It would be incongruous and totally unreasonable to permit the betting by some citizens at the race tracks as not being in violation of the constitutional prohibition on lotteries, and to simultaneously prohibit other citizens from continuing their bingo games at social gatherings. It would be hypocritically inconsistent to allow pari-mutuel betting while banning bingo. This court should take judicial notice of the fact that the playing of bingo in the Commonwealth of Kentucky, particularly in the urban areas of the State, was very common prior to the passage of the Bingo Licensing

Act. Since the General Assembly has legalized bingo for purely charitable, religious, and other specific purposes, with the *entire* net proceeds going to these organizations (KRS 238.100), the previously existing hypocritical inconsistency has been allayed. The solution to this case was succinctly stated by the Florida Supreme Court in the *Greater Loretta Improvement Association* case, *supra,* at page 672, wherein the Court stated: "The legislature, in its wisdom, has seen fit to permit this form of recreation for those unable to participate in the uncertainties of the authorized pari-mutuel pools, and, at the same time, has allowed worthy organizations to receive the benefits. We should abide by the rule of the legislature and the construction of the Constitution."

CONCLUSION

It is respectfully submitted that the judgment of the Campbell Circuit Court should be reversed, and that it should be directed to dismiss the Complaint for Declaratory Judgment, and to set aside its Findings of Fact, Conclusions of Law and Judgment, and to dissolve the injunction issued by it.

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Appellant's Petition For Rehearing Denied 17 March 19

APPENDIX 9

COURT OF APPEALS OF KENTUCKY

No. W-18-71

WILLIAM "BILL" OTTO, ET AL.,
Appellants-Petitioners,
vs.
SAMUEL KOSOFSKY and
ROBERT A. STITH,
Appellees-Respondents.
and
CITY OF NEWPORT, KENTUCKY,
Appellant-Petitioner,
vs.
SAMUEL KOSOFSKY and
ROBERT A. STITH,
Appellees-Respondents.

Appeal From The Campbell Circuit Court
Honorable Paul J. Stapleton, Judge

APPELLANT'S PETITION FOR REHEARING

* * *

STATEMENT OF THE QUESTIONS PRESENTED FOR REHEARING

Petitioner, WILLIAM "BILL" OTTO, petitions for a rehearing on and/or a modification of the opinion rendered by the Court of Appeals in the instant case on November 5, 1971, pursuant to RCA Rule 1.350. The Petitioner does this under Section B of that rule because the Court, in the opinion as rendered, has misconceived the law applicable to this case.

The opinion as rendered violates both the doctrine of stare decisis and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

* * *

MAY IT PLEASE THE COURT:

Petitioner, WILLIAM "BILL" OTTO, petitions for a rehearing on and/or a modification of the opinion rendered by the Court of Appeals in the instant case on November 5, 1971, pursuant to RCA Rule 1.350. The Petitioner does this under Section B of that rule because the Court, in the opinion as rendered, has misconceived the law applicable to this case.

The opinion as rendered violates both the doctrine of stare decisis and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The Petitioners, in their original brief, asserted that the points of law enunciated in *Commonwealth* v. *Kentucky Jockey Club,* 238 Ky. 739, 38 SW2d 987 (1931), were controlling in the present case. However, the Court of Appeals, in its initial opinion in the present case, distinguished that case because, as is stated in the present opinion on Page 6:

> "*Kentucky Jockey Club* held pari-mutuel betting at race tracks to be a form of gambling not prohibited by Section 226 of the Constitution. In that case the Court referred to the debates of the Constitutional Convention which adopted our present Constitution. In those debates, the question of whether pooling privileges at race tracks should be prohibited by the Constitution was discussed and the delegates clearly indicated intention that race track pooling was not to be prohibited by the Constitutional provision against lotteries. In *Kentucky Jockey Club,* the Court gave effect to the intention expressed by the drafters of the Constitution."

On Page 7 of the initial opinion in the present case, the Court goes on to say:

> "The attempt to include bingo within this same principle must fail because there is nothing in our judicial or legislative history to support a construction that bingo is not a form of lottery or that it was not intended to be prohibited by Section 226 of the Constitution."

This statement is erroneous. In the *Kentucky Jockey Club* case (supra), on Page 993, the Court makes very clear what was intended by the enactment of Section 226 of the Kentucky State Constitution. The Court says:

> "For many years prior to the adoption of our present constitution, laws had existed for the prohibition of all lotteries, except those authorized by the legislature. Many special acts had been passed to authorize lotteries for various purposes. The *Kentucky Digest* (Volume 3, Page 5470) contains a citation of many cases decided by this Court upon various phases of this subject. The Constitution was framed to end that practice and to outlaw lotteries, and all schemes of that character. *Commonwealth* v. *Douglass,* 100 Ky. 116, 24 SW 233, 15 Ky. Law Rep. 581, 66 Am. St. Rep. 328; affirmed

> by the United States Supreme Court, 168 U.S. 488, 18 S. Ct. 199, 42 L.Ed. 553. The verbiage of Section 226 comports with the contemporary construction given thereto. It speaks of "privileges granted," forbids "schemes for similar purposes" and all lottery "privileges or charters heretofore granted are revoked." Lotteries had become an evil of such vast proportions and corrupting influence that nothing less than absolute prohibition of them was deemed adequate."

This section of the opinion in the *Kentucky Jockey Club* (supra) case was dismissed by the writer of the initial opinion in the present case in the following language on Page 7 of his opinion:

> "Although some language in *Kentucky Jockey Club* indicated that the intention of Section 226 of the Kentucky Constitution was to prohibit state lotteries, the decision actually rested upon the intention expressed by the drafters of the Constitution."

In view of the language quoted above in the *Kentucky Jockey Club* (supra) case, it is clear that this statement gives little force to the decision of the Court in the *Kentucky Jockey Club* (supra) case. Furthermore, a reading of the debate in the Constitutional Convention makes it clear that the intenton of Constitutional Amendment 226 was to outlaw the practice of the State Legislature granting private licenses for lotteries, just as the Court says in the *Kentucky Jockey Club* (supra) opinion. Thus, the decision of the initial opinion in the present case is inconsistent with its own language. On Pages 1173-1175 of Volume 1 of the *Debates Constitutional Convention 1890,* there is recorded debate upon an amendment proposed to Section 226 as is now written. Section 226, as it now stands, and as it was passed by the Constitutional Convention of 1890, states: (See Appendix p. 23)

> "Lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes and none shall be exercised, and no scheme for similar purposes shall be allowed."

The amendment proposed in the Convention was as follows:

> "To add the words 'nor any other species of gambling or gaming.' "

It becomes very clear from the debate on this proposed amendment to Section 226 that the delegates to the Constitutional Convention intended and understood Section 226 as it was written and now stands, did but one thing, and that was to strip the State Legislature of its power to grant private lottery licenses on an individual basis. For the convenience of the Court, the full debate on this Section of the Constitution is appended to this Petition. However, I would like to quote the following succinct langaguge from Pages 1174 and 1175: (Appendix p. 26)

> ". . . The gentleman proposes to add after the word 'allowed' — 'nor any other species of gambling or gaming'. I suppose he means that no other species of gambling or gaming should be allowed. I think that the law is perfectly plain in Kentucky today that it is not allowed. If the gentleman means to propose to restrain or limit the legislature granting certain privileges that have been granted in Kentucky, I think his amendment ought to come in another portion of the section. If the gentleman means to put it squarely that the legislature shall not authorize fairs or premiums to be distributed for the exhibition of horses or cattle; if he does not mean to license pooling privileges upon race courses, I think it ought to go into another section. If he means simply to prohibit pool selling, as now practiced throughout the country, and cities, and towns, and villages, the law prohibits it now and

> parties are subject to the very heaviest of penalties; and I have no doubt the penalties are imposed. I have known instances in this Commonwealth where as high as $4,000.00 fines were imposed upon parties for violation of such laws. In other words, if the gentleman simply means to prohibit that species of gaming already prohibited by the law, it is mere childs play for us to put that in the Constitution because it is already the law of the land. It is different as to lotteries, because they are licensed by an act of the legislature. If I understand it, the Committee wants to prohibit such license being given by the Legislature. There is a very great difference in principle applying to the two."

Section 226 of the Kentucky Constitution was aimed at a great and plaguesome evil of the time, namely, *the practice of the State Legislature in granting individual private licenses to hold lotteries.* This practice made the Legislature and the individuals involved subject to the greatest temptations of corruption. In addition to the quote from the *Kentucky Jockey Club* (supra) case above, a look at the statutes dating from that time and the Kentucky cases dating from that time, will show how wde spread this practice was.

Page 33 of the *Acts of 1850,* Chapter 46 of the *Laws of Kentucky,* entitled *"An Act for the Benefit of Henry Academy and Henry Female College"* which authorized that institution to raise money by a lottery is a prime example. There are many cases of record arising from the granting of private licenses for lotteries by the Legislature: *Gregory's Ex'x* v. *Trustees of Shelby College,* 59 Ky. 589, 2 Metc. 589; *Commonwealth* v. *Whipps,* 80 Ky. 269, 3 Ky. Law Rep. 798; *Commonwealth* v. *City of Frankfort,* 76 Ky. 185, 13 Bush 185; *Commonwealth* v. *Bull,* 76 Ky. 656, 13 Bush 656; *Webb* v. *Commonwealth,* 10 Ky. Opin. 10; *Commonwealth*

v. *Douglass,* 4 Ky. Law Rep. 441; *Lawrence* v. *Simmons,* 9 SW 163, 10 Ky. Law Rep. 347, 1 L.R.A. 172.

That Section 226 was adopted to end the power of the State Legistlature to grant pernicious individual licenses and special privileges to conduct lotteries and not any other form of gambling which was still to be controlled by the police power of the Legislature. As has been said in the *City of Louisville* v. *Presbyterian Orphans Home Society,* 186 SW2d 194, 199:

> "The fundamental principle of constitutional construction was to give effect to the intent of its framers and of the people adopting it. *Rouse* v. *Johnson,* 234 Ky. 473, 28 SW2d 745, 70 ALR 1077."

In construing the constitution, the intention of the makers is to be ascertained. *State Journal Co.* v. *Commonwealth,* 160 SW2d 145. The Commonwealth, in seeking to outlaw pari-mutual betting, addressed itself to this question on Page 992 of the *Kentucky Jockey Club* (supra) case:

> "The arguments for the Commonwealth somewhat abridged, is that the words of the Constitution must be construed in their ordinary sense, most obvious to the common understanding of the people who ratify the instrument, and that the contemporaneous construction cannot be invoked to ascertain the meaning when the words used are themselves perfectly plain and free from ambiguity. Proceeding from that postulate, a definition of lotteries is given which is thought to embrace betting on horse races by the pari-mutuel system, which prevents it from being legalized by the Legislature. A lottery, it is said, is a species of gambling, defined as a scheme for the distribution of prizes or things of value by lot or chance, among persons who have paid, or agree to pay, as a valuable consideration for the chance to share in the distribution, or as a game or hazard in which small sums of money

> are ventured for the chance of obtaining a larger value of money or other articles. (Citations). A statement from Corpus Juris is quoted as follows: "The term "lottery", as defined, includes pools and pool selling on horse races and also sweepstakes on horse races, although the contrary view has been upheld" (Citation)."

In the initial opinion of the present case, the Court defines Charity Bingo as being a lottery and on Page 7 and 8 states:

> "A lottery is a scheme for the distribution of prizes or things of value purely by lot or chance among persons who have paid or agree to pay a consideration for the Chance to share in the distribution. *Commonwealth* v. *Malco-Memphis Theatres,* 293 Ky. 531, 169 SW2d 596 (1943)."

As can be seen, in both cases, first where the Legislature sought to legalize pari-mutuel betting and now when it seeks to legalize Charitable Bingo, Section 226 of the Constitution must be considered. In the *Kentucky Jockey Club* (supra) case, the Court did that. They said on Page 992:

> "The terms used are to be construed according to their meaning at the time of the adoption of the Constitution rather than any other time. (Citations).
>
> Judge Cooley, in *People* v. *Harding,* 53 Mich. 481, 19 N.W. 155, 156, said that constitutional provisions must be interpreted with reference to 'the times and circumstances under which the state constitution was formed — the general spirit of the times and the prevailing sentiments among the people. Every constitution has a history of its own which is likely to be more or less peculiar; and unless interpreted in the light of this history is liable to be made to express purposes which were

never within the minds of the people in agreeing to it.' (Citation).

At the time section 226 was being considered in the convention that framed the Constitution, an amendment was proposed forbidding every species of gambling. Volume 1, *Debates of Constitutional Convention* p. 1172. The delegate who proposed the amendment was asked whether his proposition embraced the prohibition of betting upon the speed of horses, to which he responded that it was his purpose to forbid all species of gambling and all games of chance in every conceivable form. He argued that all gambling was equally wrong, and that it was unfair to denounce gambling in the form of a lottery and to countenance it in other forms, such as betting upon horse races, and the like. The delegate from Lexington argued that it was not the appropriate place to deal with pooling privileges upon race courses, and other forms of gambling, *because lotteries theretofore had been licensed by the Legislature, and the object of the pending section was not to deal with any other species of gambling, but to prohibit the Legislature from granting licenses to lotteries.* (Emphasis ours). The amendment was rejected, thus indicating that it was the intention of the Conventon not to include in section 226 anything but lotteries of the type familiar at the time. The debates of a Constitutional Convention are not conslusive of the meaning of the Constitution, but it is proper to resort to them in order to ascertain the purpose sought to be accomplished by a particular provision where the language employed leaves the meaning in doubt. *Higgins* v. *Prater,* 91 Ky. 6, 14 SW 910, 12 Ky. Law Rep. 645.

> 'When the inquiry is directed to ascertaining the mischief designed to be remedied, or the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument. When the proceedings clearly point out the pur-

> pose of the provision, the aid will be valuable and satisfactory.' Cooley, Con. Lim. § 66, quoted by Judge Holt in 91 Ky. at page 17, 14 SW 910, 912, supra.

Consulting the Constitutional Debates, of course, is permissible, not mandatory. And even then, the debate is only persuasive, not conclusive. *Stickler* v. *Higgins,* 106 SW2d 108, 112. But the point is, that the Court, in the *Kentucky Jockey Club* (supra) case did consult the Constitutional Debates to determine that pari-mutuel betting was not included in the prohibitions of Section 226 of the Kentucky Constitution. The Court further said in that case on Page 993 as was quoted above, Section 226 was designed to outlaw the granting of private license lotteries by the Legislature. A reading of the constitutional debates shows that this was exactly what that section was designed to do. The initial opinion in the present case is in error because it fails to give effect to the findings in the *Kentucky Jockey Club* (supra) case on this point and because it does not go behind words of Section 226 to its intent as framed by its founders as was shown in the Constitutional Debates and as was done in the *Kentucky Joceky Club* (supra) case. The initial opinion in the instant case thus violates the doctrine: "stare decisis et non queita movera", that is to say, to stand by precedents and not disturb settled points. *Daniel's Adm'r.* v. *Hoofnel,* 155 SW2d 469, 471, as was pointed out in the dissent to the initial opinion in the present case. What is particularly unsettling about the initial opinion in the present case is that it violates stare decisis on a question of constitutional construction. The Court has said in *Maddox, et al.* v. *Grimm and Knox,* 59 Ky. 56, 85-86, 2 Metc. 56:

> ". . . Where the meaning of the constitution on a doubtful question has been once carefully considered

> and judicially decided the instrument is to be received in that sense and every reason is in favor of a steady adherence to the authoritative interpretation."

The Court went on to say in the *City of Louisville* v. *Presbyterian Orphans Home Society* (supra) on Page 201:

> "If the original construction of Section 170 was correct, then to change the construction would be, in effect, to amend the constitution, a function not belonging to the Court."

It is obvious that the Court in the present case will be so amending the Constitution if they refuse to place the same construction on Section 226 as was given in the *Kentucky Jockey Club* (supra) case. If the Court does not wish to use the reasoning that was put forward in the *Kentucky Jockey Club* (supra) case, in the instant case, then the *Kentucky Jockey Club* (supra) case must be overruled. To do otherwise, would be to violate the doctrine of stare decisis. Or as the Court said in *Daniel's Adm'r* v. *Hoofnel* (supra) at Page 471:

> "This wholesome rule is not inflexible or so imperative as to require the perpetuation of error, but departure from the policy as declared can be justified only upon substantial grounds."

There are no such substantial grounds in this case. In addition, Section 238 of the Kentucky Revised Statutes, must be declared constitutional in light of the *Kentucky Jockey Club* (supra) case, because to fail to do so would be to violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. The lottery elements of charitable bingo and pari-mutuel betting have been defined as consideration, change and distribution. If the Legislature is to be allowed to pass a law establishing pari-mutuel betting in spite of Section 226 of the Constitution and be upheld by the Courts, and thereafter to pass a law allowing charity bingo and be overruled by the Courts, this can only be seen as the grossest form of economic/social discrimination. There cannot be two laws in the State of Kentucky, one for the rich and one for the poor. There cannot be two interpretations of Section 226 of the Constitution of Kentucky, one for the rich and one for the poor. Nor can there be two interpretations of the intent of the framers of the Constitution of 1890, one for the rich and one for the poor. Certainly this Court is not disposed to deny to the elderly, bored and lonely what it permits the sport of Kings, as Commissioner Vance appears to reason. Either they intended to do away with the evil of individual licensed lotteries by the Legislature and to leave all other forms of gabling under the control of the police power of the Legislature, or every form of game of chance should be outlawed as was said in the dissent in the initial opinion of the instant case, for pari-mutuel betting has the elements of consideration, chance and distribution just as charity bingo.

When the State Legislature enacted KRS 238, it obviously classified bingo with pari-mutual betting as a form of gambling not violative of Section 226 of the Kentucky State Constitution and, as the Court has said in *Walters* v. *Bender,* 435 SW2d 464, 467:

> "Our Legislature has a broad discretion to determine for itself what is harmful to health and morals or would be inimical to public welfare. We will try to refrain from usurping its perogatives."

Had the Legislature undertaken to allow pari-mutuel betting while forbidding charitable bingo, this clearly would not have been a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution, for it has been held under the exercise of police powers, states can distinguish between kinds of gambling, allowing some and refusing to allow others. *People* v. *Monroe,* 182 NW 439, 49 Ill. 270; *Mills* v. *Agnew,* 286 F.Supp. 107 (1968); *Ex Rel. McKelvey, et al.,* 64 Pac. 2nd 1002. But here Legislature has allowed one form of gambling and is seeking to allow a second. The Court upheld it in the first instance but seeks to deny it in the second. By what authority does the Court allow one form of gambling while denying the other in face of the mandate of the Legislature. The Court would not only violate the doctrine of separation and equality of the three branches of government, but would also deny equal protection of the law in that they apply one judicial standard to one type of gambling and another to another. Either all types of gambling authorized by the Legislature must be allowed or all must be held unconstitutional.

CONCLUSION

For reasons stated, the Petitioners move that the initial opinion be modified or a re-hearing be granted in the present case and that KRS 238 be declared not in violation of Section 226 of the Kentucky Constitution in view of the construction put upon that section of the Constitution in the *Kentucky Jockey Club* (supra) case or that the *Kentucky Jockey Club* (supra) case be overruled.

Finally, the Petitioner, to conserve the time of this Court has limited his arguments to the constitutionality of KRS 238 under Section 226 of the Kentucky Constitution as this was the only point ruled on by the lower Court and the only point discussed in the initial opinion of the Court of Appeals. If the Court agrees with the Petitioner that KRS

238 is Constitutional under Section 226, in view of the construction given to Section 226 by the Kentucky Constitution by the *Commonwealth – Jockey* Case (supra) but feels that there are other constitutional issues raised in the Court below, or in the briefs to the Court of Appeals, the Petitioner moves to be allowed to submit an additional written argument or oral argument on those points as these points were not fully discussed in either the Court below or in the Appellant Brief. Or, if the Court feels the other points should be heard, the Petitioner suggests it might be proper to remand the case to the trial court to determine the constitutionality of KRS 238 under the other sections cited.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT
BY COMMISSIONER VANCE, previously printed at p. 27

SEPARATE CONCURRING OPINION
BY OSBORNE, J., previously printed at p. 33

DISSENTING OPINION BY HILL, J.,
previously printed at p. 34

DEBATES CONSTITUTIONAL CONVENTION 1890

BILL OF RIGHTS

Tuesday,] [November 11.

McDERMOTT—FUNK—MILLER.

The next amendment of the Committee of the Whole was read, and is as follows:

Amendment proposed to section 26: Amend section 26 by adding after the word "allowed," in line 3 of said section, the following: "Nor any other species of gambling or gaming."

A vote being taken on the amendment, it was rejected.

Mr. FUNK. Will not the mover of an amendment be given an opportunity of saying a word on it? I am the mover of that resolution.

The PRESIDENT. The gentleman did not rise in time.

Mr. FUNK. The President did not have his eyes this way.

DELEGATES. Leave! Leave!

Mr. BRONSTON. I object. The vote has been announced.

The PRESIDENT. The vote has been announced; and if the gentleman insists upon his objection, the Chair will sustain it.

Mr. MACKOY. If necessary, I will move a reconsideration.

A vote being taken on the motion to reconsider, it was declared carried.

Mr. FUNK. I have already spoken on this amendment. It will be only necessary for me to say a few words in order that my position may be fully understood. I would request the Clerk to read the section of my amendment, in order that the members may fully understand what is sought to be done.

The Reading Clerk read the amendment, which is as follows:

Lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes and none shall be exercised, and no schemes for similar purposes shall allowed.

With the amendment the section would read as follows:

Lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes and none shall be exercised, and no schemes for similar purposes shall be allowed, nor any other species of gambling or gaming.

Mr. FUNK. If one class of gambling is wrong, every other class of gambling is equally wrong. If it is the object of this Convention to stop one form of gambling, it is nothing but right and proper that the Convention should in the Constitution prohibit all. I have heard a great deal said upon this floor about equal rights and exclusive privileges, but I say here, without fear of successful contradiction, that if you adopt this lottery clause, and prohibit lotteries, you are simply prohibiting gambling in one form and countenancing it in another. I believe that gambling in any form is wrong. It is harmful to the morals of the people. I do not believe that lottery playing is more harmful than the pool-rooms, where a multitude of young men gather daily for the purpose of betting on horse races, speculating in grain or pork, or dealing in "futures." I claim that the running of a lottery office is just as legitimate a business as the running of a bucket-shop. If you are going to put down one class of gambling, let us put it all down. Do not say to one class of people "You shall not gamble," and then to another class of people, "Go on with your gambling." One form is just as harmful as another. If it is the determination of this Convention not to accept that amendment, then, in justice to all the people, they should repudiate the portion which is submitted here by the Committee. What I have said, I believe to be right, just and honest. It is for this Convention now to say whether they think as I do. I will be satisfied with the result, but I believe it is of so much importance that I will call for the yeas and nays on this question.

Mr. COX. Will the gentleman from Louisville permit me to ask him a question?

Mr. FUNK. Certainly.

Mr. COX. That question is this: Does his amendment embrace betting upon the speed of horses?

Mr. FUNK. All species of gambling, and all games of chance, such as oontz, craps, bucket-shops, grain gambling, betting on base ball, draw-poker, and the Lord only knows how many other species, but in a very few words, I have tried to cover them all.

Mr. HENDRICK: I rise to a parliamentary inquiry. I am a little confused as to the precise position of the matter. As I understand, the Committee of the Whole have adopted this particular section 26, to which the gentleman from Louisville proposes the following amendment: "Nor any other species of gambling or gaming." As I understand, we are acting upon the question of the adoption of that amendment.

The **PRESIDENT**. The amendment advocated by the gentleman was adopted by the Committee of the Whole; and the question is on the adoption of that amendment, and upon that the Delegate from the Seventh District of Louisville, seconded by the Delegate from Marshall, call for the yeas and nays. The Secretary will report the order under which we are acting, however, for the information of the Convention.

The **READING CLERK**. Under the order of the Convention, the Secretary was instructed to have printed the original report of the Committee on Preamble and Bill of Rights, the several amendments adopted thereto by the Committee of the Whole; and then the original report, as it would read as amended by the several amendments of the Committee of the Whole. That is how this came to be incorporated in this 26th section.

Mr. **BRONSTON**. I would like to vote intelligently upon this question, and I would be very glad if the gentleman from Louisville, who offers this amendent, will explain to me the force and effect of it. I will read the section of the Committee's report to which this is an amendment. Section 26 reads as follows: "Lotteries and gift enterprises are forbidden." I can understand that. "And no privileges shall be granted for such purposes." That is very clear. "And none shall be exercised and no schemes for similar purposes shall be allowed." The gentleman proposes to add after the word "allowed" "Nor any other species of gambling or gaming." I suppose he means that no other species of gambling or gaming shall be allowed.

I think that the law is perfectly plain in Kentucky to-day that is is not allowed. If the gentleman means or proposes to restrain or limit the Legislature in granting certain privileges that have been granted in Kentucky, I think his amendment ought to come in another portion of the section. If the gentleman means to put it squarely that the Legislature shall not authorize fairs or premiums to be distributed for the exhibition of horses or cattle; if he does not mean to license pooling priviliges upon race courses, I think it ought to go in another section. If he means simply to prohibit pool selling, as now practiced throughout the country, and cities, and towns, and villages, the law prohibits it now, and parties are subject to the very heaviest of penalties; and I have no doubt the penalties are imposed. I have known instances in this Commonwealth where as high as $4,000 fines were imposed upon parties for violation of such laws. In other words, if the gentleman simply means to prohibit that species of gaming already prohibited by the law, it is mere child's play for us to put that in the Constitution, because it is already in the law of the land. It is different as to lotteries, because they are licensed by an act of the Legislature. If I understand it, the Committee want to prohibit such license being given by the Legislature. There is a very great difference in principle applying to the two.

Mr. AUXIER. I want to know if the amendment of the Delegate from the Seventh District of the City of Louisville is a part of the report of the Committee of the Whole, and has been adopted as a part of it?

The PRESIDENT. It has been adopted in that day. It has been adopted in Committee of the Whole.

Mr. RODES. I do not know. I may be mistaken, but I think there is some misapprehension about it. I think the question now to be put it this: Whether we will agree that the amendment offered by the gentleman from Louisville shall remain and be a part of the twenty-sixth section as reported by the Committee on Bill of Rights.

The PRESIDENT. But still there is an amendment of the Committee of the Whole to that section.

The Clerk proceeded to call the roll on said amendment, which resulted as follows

YEAS—38.

Allen, M. K.
Ayers, W. W.
Bennett, B. F.
Birkhead, B. T.
Bourland, H. R.
Brown, J. S.
Clardy, John D.
Doris, W. F.
Durbin, Charles.
Edrington, W. J.
Elmore, T. J.
Farmer, H. H.
Field, W. W.
Funk, J. T.
Goebel, Wm.
Graham, Samuel
Harris, Geo. C.
Hines, J. S.
Hogg, S. P.
Knott, J. Proctor
Lewis, W. W.
Martin, W. H.
McElroy, W. J.
Miller, W. H.
Moore, Laban T.
Parson, Rob't T.
Petrie, H. G.
Phelps, John L.
Phelps, Zack
Pugh, Samuel
Ramsey, W. R.
Smith, H. H.
Smith, W. Scott
Twyman, I. W.
West, J. F.
Williams, L. P. V.
Wood, J. M.
Young, Bennett H.

NAYS—52.

Allen, C. T.
Amos, D. C.
Askew, J. F.
Auxier, A. J.
Beckham, J. C.
Beckner, W. M.
Berkele, Wm.
Blackburn, James
Blackwall, Joseph
Boles, S. H.
Brents, J. A.
Bronston, C. J.
Brummal, J. M.
Buchanam, Nathan

Buckner, S. B.
Bullitt, W. G.
Burnan, Curtis F.
Coke, J. Guthrie
Cox, H.
DeHaven, S. E.
Forrester, J. G.
Forgy, J. M.
Glenn, Dudley A.
Hanks, Thos. H.
Hendrick, W. J.
Hines, Thos. H.
Holloway, J. W.
Hopkins, F. A.
Jacobs, R. J.
James, A. D.
Johnston, P. P.
Kennedy, Hanson
Kirwen, E. E.
Lassing, L. W.
Mackoy, W. H.
May, John S.
McChord, Wm. C.
McDermott, E. J.
McHenry, H. D.
Miller, Will
Montgomery, J. F.
Moore, J. H.
Muir, J. W.
Nunn, J. T.
Pettit, Thos. S.
Rodes, Robert
Straus, F. P.
Swango, G. B.
Truesdell, George
Washington, George
Whitaker, Emery
Mr. President Clay

ABSENT—10.

Applegate, Leslie T.
Carroll, John D.
Chambers, G. D.
English, Sam E.
Jonson, Jep C.
O'Hara, R. H.
Quicksall, J. E.
Sachs, Morris A.
Spalding, I. A.
Woolfolk, J. F.

The next amendment of the Committee of the Whole is that by which section 27 was stricken out.

APPENDIX 10

(238 Ky. 739)

COMMONWEALTH v. KENTUCKY JOCKEY CLUB et al.

Court of Appeals of Kentucky.

March 3, 1931.

Rehearing Denied June 16, 1931.

1. **Lotteries, Key 2.**

In construing Constitution forbidding lotteries, purpose and meaning of words used must be deduced from intention they express, considered in light of history that pertains to subject (Const. § 226).

> Const. § 226, provides that lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and none shall be exercised, and no schemes for similar purposes shall be allowed.

2. **Constitutional law, Key 16.**

Debates of Constitutional Convention may be resorted to in ascertaining purpose sought to be accomplished by particular constitutional provision where language is ambiguous.

3. **Courts, Key 93(1).**

Courts will not overturn long line of decisions where large investments have been made on faith thereof.

Key — For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

4. Courts, Key 90(3).

In determining whether pari mutuel system of betting on horse races constitutes lottery within Constitution, Court of Appeals is bound by its previous decisions and history on subject (Const. § 226).

5. Gaming, Key 62.
Lotteries, Key 3.

"Gaming," "betting," and "lotteries" are separate and distinct things.

> [Ed. Note. — For other definitions of "Bet," "Game" and "Lottery," see Words and Phrases.]

6. Lotteries, Key 3.

Betting on horse races by pari mutuel system *held* not to constitute "lottery" within Constitution (Ky. St. §§ 1328a, 1960, 1961, 2573, 3990a–1 to 3990a–5, 3914b–6, 4223b–1; Const. § 226).

7. Constitutional law, Key 50.

It is within power and duty of Legislature to discern and correct evils, which power embraces removal of obstacles to greater public welfare.

8. Gaming, Key 63(1).

Legislature possesses power to prohibit all forms of gambling, which includes power to regulate as well as right to prohibit in part and regulate in part, provided all persons in like situations are treated alike.

9. Statutes, Key 77(1).

Only limitation on legislative power of classification in enacting statute is that classification shall be founded on some reasonable and actual distinction.

10. Gaming, Key 63(1).

In determining validity of statute permitting pari mutuel system of betting on horse races on regular race track during races thereon, it was to be assumed that facts called for separate classification of race track betting (Ky. St. §§ 1960, 1961).

> Ky. St. § 1960, comprehensively condemns all the acts described therein, while section 1961 merely excepts from the operation of section 1960 the persons who employ the pari mutuel system of betting on horse races within the inclosures while the races are being run, and amounts to a provision of law that one limited form of betting under specified conditions and control is not prohibited.

11. Constitutional law, Key 205(2).
Gaming, Key 63(1).

Statutes permitting pari mutuel system of betting on horse races within inclosures of regular race track while races are being run *held* not unconstitutional as special privilege (Ky. St. §§ 1960, 1961; Const. § 3).

12. Statutes, Key 109.

Subject of legislation and not form thereof must be embraced by title of act (Const. § 51).

13. Statutes, Key 118(3).

Title to act concerning gaming *held* sufficient, although it contained no reference to exception of pari mutuel system of betting on horse races (Ky. St. §§ 1960, 1961; Const. § 51).

> The bill (Ky. St. §§ 1960, 1961) was entitled "an act concerning gaming," and necessarily covered all matters concerning gaming, including that embraced as well as that excluded from the terms of the law.

14. Statutes, Key 75.

Constitution restraining enactment of special or local act by repeal in part of general act *held* not applicable to determination of constitutionality of statutes permitting pari mutuel system of betting on horse races within inclosures while races are being run (Ky. St. §§ 1960, 1961; Const. § 60).

15. Statutes, Key 86.

Statute creating offense of gaming, and providing that it shall not include pari mutuel system of betting on horse races within inclosures while races are being run, *held* not forbidden by Constitution prohibiting passage of local or special act (Ky. St. §§ 1960, 1961; Const. § 59, subsecs. 4, 29).

> Const. § 59, subsec. 4, forbids the Legislature from passing any local or special act to regulate the punishment of crimes and misdemeanors, or to remit fines or forfeitures, and subsection 29 precludes all special laws where a general law can be made applicable to the subject.

16. Constitutional law, Key 42.

Invalidity of entire act concerning gaming because of exception of certain cases from its operation could be raised only by person prosecuted under act (Ky. St. §§ 1960, 1961).

17. Statutes, Key 77(1).

Degrees of evil may afford sufficient basis for varying treatment by law.

18. Statutes, Key 77(1).

When facts warrant classification, and it has relation to purpose of law, is supported by reasonable distinction, and operates uniformly on all within class, legislation is valid.

19. Statutes, Key 86.

That exemption from gaming statute applied only to pari mutuel system of betting on horse races on regular race track during races thereon did not affect validity of exemption (Ky. St. §§ 1960, 1961).

20. Injunction, Key 102.

Equity will not grant injunction to prevent violation of criminal statutes not involving use of property, breach of contracts, or maintenance of public nuisance.

21. Injunction, Key 102.

Act which would constitute violation of act to prevent corrupt practices could not be restrained by injunction (Ky. St. §§ 1574a–1 to 1574a–3).

22. Injunction, Key 102.

Injunction would not lie to restrain corporation from participating in elections (Ky. St. §§ 1574a–1 to 1574a–3).

23. Corporations, Key 599.

Before charter of corporation may be forfeited for pernicious political activities, there must first be obtained in criminal proceeding judgment of conviction for their commission (Ky. St. §§ 1565b–1, 1565b–2, 1574a–1 to 1574a–3; Const. § 150).

24. Quo warranto, Key 49.

Allegations *held* insufficient to make out case of corrupt lobbying against horse-racing clubs incorporated in 1928 as regards basis for forfeiting charters (Ky. St. § 1961).

> The pleadings alleged an agitation for the repeal of the exemption in Ky. St. § 1961; that afterwards various bills were introduced in the General Assembly at each session providing for a repeal of such law, and that defendants, to defeat the bills, employed various persons to attend each and every session of the General Assembly, to influence members of the General Assembly to vote against the repeal of such law. However, the petition alleged further facts showing that defendants did not come into being until during the 1928 legislative session, whereas the amended petitions to forfeit the charters of the clubs were not filed until 1929, so that the clubs could not have attended any other than the 1928 legislative session.

25. Evidence, Key 33.

Courts judicially know that only session of General Assembly held since January, 1928, was session of 1928.

26. Pleading, Key 34(4).

Pleading must be construed most strongly against pleader.

27. Quo warranto, Key 49.

Allegations *held* to make out case of corrupt lobbying against horse racing club dissolved previously to filing petition for forfeiting charter.

28. Corporations, Key 76.

Sale of stock of corporation on credit is not violation of statutes or Constitution (Ky. St. § 543).

29. Quo warranto, Key 49.

Allegations that corporations purposed establishing monopoly of race-track business *held* insufficient to form basis for forfeiting their charters for engaging in transactions detrimental to public welfare.

30. Clubs, Key 9.

Corporations engaging in race-track business had right to issue free passes, if they so desired; hence allegations regarding issuance of such passes did not warrant forfeiture of charters.

31. Quo warranto, Key 49.

Allegations of investment by corporations engaging in race track business of their capital and surplus in stock of other corporations *held* insufficient to raise question of illegality; there being no allegation that such investment was not authorized by charters.

32. Quo warranto, Key 19.

Under statute, commonwealth may maintain civil action in nature of quo warranto to forfeit charter of corporation (Ky. St. § 569; Civ. Code Prac. § 480).

33. Common law, Key 7.

Statute of Anne authorizing courts to enter judgment of fine and ouster in proceedings in nature of quo warranto *held* not law in Kentucky.

34. Quo warranto, Key 61.

No substantial fine may be imposed in quo warranto proceedings to forfeit charters of corporations (Ky. St. § 569; Civ. Code Prac. § 480).

35. Pleading, Key 214(1).

Allegations of petition are admitted by demurrer.

36. Quo warranto, Key 61.

If corporation had, in order to defeat collection of money judgment which might be obtained in quo warranto proceedings, transferred all assets to other corporations latter corporations would be liable, to extent, at least, of assets received by them, for such money judgment.

37. Penalties, Key 32.

In penal action to recover fine, it must be alleged that acts complained of occurred within year preceding filing of petition (Ky. St. § 1138).

38. Limitation of actions, Key 35(1).

Fine imposed in quo warranto proceedings to forfeit charters of corporations is civil in its character, and hence not governed by one-year limitation statute (Ky. St. § 1138).

39. Limitation of actions, Key 182(2).

Since fine which may be imposed in quo warranto proceedings to forfeit charters of corporations is civil in its nature, limitation statute must be pleaded as defense (Ky. St. § 2515).

40. Action, Key 16.

Nature of judgment does not determine character of action.

41. Judgment, Key 249.

Character of action determines nature and scope of judgment.

42. Quo wararnto, Key 62.

Quo warranto proceedings to forfeit charters of corporations could not be reversed for imposition of only nominal fine.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Suit by the Commonwealth against the Kentucky Jockey Club and others. From judgment dismissing the action, the Commonwealth appeals.

Affirmed.

J. W. Cammack, Atty. Gen., M. B. Holifield, Asst. Atty. Gen., Elwood Hamilton, of Louisville, and Coleman Taylor, of Russellville, for appellant.

A. J. Carroll, A. B. Bensinger, and H. E. McElwain, Jr., all of Louisville, and Maurice Galvin, of Cincinnati, Ohio, for the Commonwealth.

PER CURIAM.

The commonwealth instituted an action in equity against the Kentucky Jockey Club, Latonia Jockey Club, and Churchill Downs, to inquire into the character of their past transactions, and to regulate the scope of their future conduct. The petition presented a threefold aspect, asking relief of an equitable character, embracing also an action in the nature of a quo warranto to forfeit the charters and franchises of the several corporations, and seeking incidentally to recover a large sum of money as damages.

The right to forfeit the franchises of the three defendants was claimed upon the grounds:

(1) That they had operated the pari mutuel system of betting on horse races within the inclosures at the race tracks, and while the races were being run thereon, under licenses from the state racing commission, upon the assumed authority of statutes that were unconstitutional and void.

(2) That they had committed offenses against the statutes of the state designed to prevent and to punish corrupt lobbying and pernicious political practices.

(3) That they had committed acts and engaged in transactions not prohibited or punished by any particular statute, but detrimental to the public welfare, and violative of the implied and express contracts upon which the continuance of the corporate franchises were conditioned, and which constituted an abuse and misuse of their powers.

The prayer for an injunction was predicated upon an assumption of the accuracy of the grounds of forfeiture just recited, and was designed to restrain the defendants from the use of their property for the creation or continuance of a public nuisance, and from threatened violation of penal statutes, respecting race track gambling and the corruption of elections.

A substantial sum of money was demanded as damages on account of the acts for which forfeiture of franchises was claimed, and as an incident to the relief sought in that part of the action in the nature of a quo warranto.

The final feature of the petition, and which, in connection with the claim for an injunction, constituted its character as an action for equitable relief, was designed to subject the assets of the Latonia Jockey Club and Churchill Downs, derived by them from the Kentucky Jockey Club, to the satisfaction of the damages demanded from the latter because of its conduct as delineated in the petition. The defendants challenged every position taken by the commonwealth in the petition.

The chancellor held: (a) That the statutes permitting pari mutuel betting on horse races under certain conditions were constitutional and valid; (b) that the commonwealth was not entitled to an injunction; (c) that the right to relief against the Kentucky Jockey Club for its other alleged acts was not defeated by its dissolution or the devolution of its property to its creature corporations, and that a substantial fine could be imposed upon it, as an incident to the ouster, if that action was found justified, but in the determination of which it was entitled to a jury trial; (d) that, if the commonwealth recovered a substantial judgment as a penalty, fine, or damages in the civil action in the nature of a quo warranto, it would have the right in equity to subject the assets of the two creature corporations, received from the Kentucky Jockey Club in consideration of their capital stock, to the satisfaction of such judgment. The case, therefore, was transferred to the common pleas branch for the trial of the issues concerning which defendants were entitled to a jury trial. Judge Dailey, to whom the case was referred, reconsidered the issues raised, and decided that the petition failed to state a cause of action against the Kentucky Jockey Club, since it did not contain allegations excluding the operation of section 1138, Kentucky Statutes, providing that "prosecutions by the commonwealth to recover a penalty for a violation of any penal statute or law" shall be commenced within one year after the right to such penalty accrued, and not thereafter, "unless a different time is allowed by the law imposing the penalty." He held that no cause of action was stated against Churchill Downs sufficient to authorize a forfeiture of its charter, and that the Latonia Jockey Club was not suable in Jefferson county for anything alleged against it. The rulings resulted in a final dismissal of the action, and the commonwealth complains thereof.

1. The first question to be disposed of is the validity of the various statutes exempting the pari mutuel system of betting on horse races under certain conditions from the operation of the anti-gambling laws. A brief history of the course of legislation and judicial decision upon the subject is appropriate. In 1881, this court decided that the machine known as French pool or pari mutuel was "a contrivance used in betting," within the denunciation of the statutes then in force. Com. v. Simmonds, 79 Ky. 618; Cf. Elias & Co. v. Gill, 92 Ky. 573, 18 S. W. 454, 13 Ky. Law Rep. 798. In 1886 the Legislature enacted the law constituting the present sections 1960 and 1961 of the Kentucky Statutes. The original bill passed by the Senate contained no exemptions of any character. In the House an amendment was added by which it was provided: "This act shall not apply to persons who may sell combination or French pools on any regular race track during the races thereon." The Senate accepted the amended, and so the act was adopted and approved March 25, 1886. 1 Session Acts 1885-86, p. 36; Gen. Stats. (1887 Ed.) p. 692.

After the adoption of the present Constitution, the Statutes were revised, re-enacted, and republished as Kentucky Statutes, and the present sections 1960, 1961, were carried forward in that revision Acts 1891-92-93, c. 177, p. 740, §§ 6, 7.

In 1906 an act was adopted creating the state racing commission and defining its powers and duties. Ky. Stats. §§ 3990a—1 to 3990a—5. It was empowered to prescribe the rules under which running races could be conducted in this commonwealth.

In 1908 the "Pool Room Act" was enacted, with comprehensive inhibitions, but containing this exemption:

"The provisions of the act shall not apply to enclosures during regular race meetings or such enclosures wherein horse racing is being conducted under license from the state racing commission, and it shall not apply to enclosures during regular race meetings wherein trotting and pacing races are being conducted by regularly organized associations organized for that purpose." Kentucky Statutes, § 3914b—6. This act was held valid in Com. v. Starr, 160 Ky. 260, 169 S. W. 743.

In 1920, section 1328a, Kentucky Statutes, was passed prohibiting betting on horse races, except at authorized race meetings held pursuant to license from the state racing commission. At the same session a tax of $2,500 for each day races were run was imposed upon each race track under the jurisdiction of the state racing commission. Section 4223b—1, Ky. Stats.

In 1908 the case of Grinstead v. Kirby, 110 S. W. 247, 33 Ky. Law Rep. 287, was decided. The opinion did not discuss the validity of the various statutes then in force. It dealt only with a construction thereof. The court tacitly assumed the constitutionality of the statutes. In the course of the opinion, it was said:

"When the new Constitution came into effect, and special legislation was prohibited, it was perceived by the Legislature that some general provision must be made if the privileges which these racing associations then enjoyed were to continue. The raising of horses for the track had long been a favored industry in a large part of the state and much capital was invested in it. The Legislature evidently had in mind granting a privilege to the regular race tracks during the races thereon. * * * The object of the exception was not to protect those who sell the pools. What the Legislature had in mind was the benefit to the regular race tracks during the races thereon. * * * It cannot be presumed that the Legislature intended in one section of the act to legalize the selling of the pools and in another section to impose a penalty on all those who buy pools. * * * But manifestly the Legislature intended that the selling of combination or French pools on any regular race track during the races thereon should not be illegal."

In State Racing Commission v. Latonia Agricultural Association, 136 Ky. 173, 123 S. W. 681, 25 L. R. A. (N. S.) 905, the question presented was the validity of a rule of the racing commission to prohibit "book making" on the race courses and to prescribe the pari mutuel system of betting. In the opinion it was said (page 182 of 136 Ky., 123 S. W. 681, 684):

"But the Legislature by section 1961 excepted race tracks from the operation of the 'Paris-Mutual' system of betting, which was sustained by this court as a legitimate exercise of police power, in Grinstead v. Kirby, 110 S. W. 247, 33 Ky. Law Rep. 287."

The court then was composed of the members which had constituted it less than two years before when the case of Grinstead v. Kirby was decided.

In City of Louisville v. Wehmhoff, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201, 25 Ky. Law Rep. 995, 1924, it was said: "French pool or Paris mutual is a 'machine or contrivance used in betting,' as is shown by its description in Commonwealth v. Simmonds [79 Ky. 618], supra. Furthermore, section 1961, Ky. St. 1903, indicates that it was so regarded by the Legislature. For in that section it is said that the change of the name of the games or contrivances 'mentioned or included in the preceding section shall not prevent the conviction of any person violating the provisions thereof. * * * Nor shall its provisions apply to persons who sell combination or French pools on any regular race track during the races thereon.' In French pool the operator of the machine does not bet at all. He merely conducts a game, which is played by the use of a certain machine, the effect of which is that all who buy pools on a given race bet as among themselves; the wagers of all constituting a pool going to the winner or winners. The operator receives 5 per cent of the wages as his commission. But in selling ordinary pools on horse races the seller does not operate a 'machine or contrivance used in betting.' Neither does he bet on a horse race. Such was the express decision of this court in Cheek v. Commonwealth, 79 Ky. 359, 2 Ky. Law Rep. 339. Therefore, as said by the court in that opinion, 'there is no express statutory penalty against the specific act of selling pools.' In that opinion the other statute referred to by counsel (what is now section 1960) was referred to, and held not to include pool selling, while French pool was held by the court in the Simonds Case, supra, to be under that statute."

The case of Douglas Park Jockey Club v. Talbott, 173 Ky. 685, 191 S.W. 474, 475, involved the validity of a rule of the racing commission prescribing the minimum purses to be given by any race track at a meeting held under the authority of the commission. The rule was challenged upon the ground that it exceeded the power of the commission, and that it constituted a discrimination among those in similar situations. In the opinion it was said:

"In State Racing Commission v. Latonia Agricultural Ass'n, 136 Ky. 173, 123 S. W. 681, 25 L. R. A. (N. S.) 905, this court declared that act to be constitutional and valid; * * * that it is a police regulation, outlawing all racing, except as licensed by the commission, who shall in advance prescribe the general conditions upon which the license may be obtained; and that it invests the commission with the power to ascertain the fact whether or not a given applicant for license is so situated as to conduct orderly, lawful public races, 'to ascertain and set forth the particular states of fact that will promote the breeding of thoroughbred horses, and the conducting of legitimate races, and to prohibit the evil of unlawful gambling on the race courses.'"

The power of the commission in the premises and the propriety of its exercise in the instance presented were upheld by the court.

In Erlanger Kennel Club v. Daugherty, 213 Ky. 648, 281 S. W. 826, 830, it was said:

"Learned counsel in an amicus curiae brief asks us to declare unconstitutional and invalid the provision in section 1961, supra, of our Statutes exempting from the provisions of section 1960 'persons who sell combination or French pools on any regular race track during the races thereon,' and also declare invalid the exclusion contained in section 3914b–6 from the operation of the provisions of the Pool Room Act. But since the case may be disposed of (as we have already done) without consideration of those questions, and since the parties who would be directly affected thereby are not parties to this litigation, we have concluded to not take up or in any manner consider those questions in this opinion."

In the light of this legislative and judicial history, we come to consider the present attack by the commonwealth upon the constitutionality of the exemption contained in section 1961. The commonwealth invokes the Constitution, and relies upon section 226, forbidding lotteries, section 3 against special privileges, except in consideration of public services, section 51 concerning the title of acts, section 59, subsection 4, inhibiting the passage of local or special acts "to regulate the punishment of crimes and misdemeanors, or to remit fines, penalties or forfeitures," and subsection 29, precluding all special laws where a general law can be made applicable to the subject, and section 60, restraining the General Assembly from enacting any special or local Act by the repeal in part of a general act, or by exempting from the operation of a general act any city, town, district, or county.

Section 226 of the Constitution reads: "Lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and none shall be exercised, and no schemes for similar purposes shall be allowed. The general assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked."

The argument for the commonwealth, somewhat abridged, is that the words of the Constitution must be construed in their ordinary sense, most obvious to the common understanding of the people who ratified the instrument, and that the contemporaneous construction cannot be invoked to ascertain the meaning when the words used are themselves perfectly plain and free from ambiguity. Proceeding from that postulate, a definition of lottery is given which is thought to embrace betting on horse races by the pari mutuel system, which prevents it from being legalized by the Legislature. A lottery, it is said, is a species of gambling, defined as a scheme for the distribution of prizes or things of value, by lot or chance, among persons who have paid, or agree to pay, a valuable consideration, for the chance to share in the distribution, or as a game or hazard in which small sums of money are ventured for the chance of obtaining a larger value in money or other articles. 25 Cyc. 1633; 38 C. J. p. 286; 19 Am. & Eng. Enc. of Law. (2d Ed.) p. 588; Commonwealth v. Jenkins, 159 Ky. 80, 166 S. W. 794, Ann. Cas. 1915B, page 170.

A statement from Corpus Juris is quoted as follows:

"The term 'lottery,' as defined, includes pools and pool selling on horse races and also sweeptakes on horse races, although the contrary view has been upheld." 38 C. J. p. 310. The cases cited to sustain the text are: Boyland v. State, 69 Md. 511, 16 A. 132; State v. Lovell, 39 N. J. Law, 458; Irving v. Britton, 8 Misc. Rep. 201, 28 N. Y. S. 529.

The commonwealth cites also the Nebraska case of State v. Ak-Sar-Ben Exposition Co., 118 Neb. 851, 226 N. W. 705.

The New Jersey case clearly held that betting upon horse races by the system known as "Combination or French pool" was so affected by the elements of chance as to constitute a violation of the New Jersey laws against lotteries. It is true that chance is an essential element in a lottery, but the weight of authority does not sustain the position of the New Jersey court that the result of a horse race depends on mere chance within the meaning of that term in a definition of lottery. 38 C. J. p. 290, § 5; 17 R. C. L. 6—10, p. 1222; State Racing Commission v. Latonia Agricultural Ass'n, 136 Ky. 173, 123 S. W. 681, 25 L. R. A. (N. S.) 905; Utah State Fair Ass'n v. Green, 68 Utah, 251, 249 P. 1016; People v. Fallon, 152 N. Y. 13, 46 N. E. 296, 37 L. R. A. 227, 57 Am. St. Rep. 492, affirming 4 App. Div. 82, 39 N. Y. S. 865.

The Nebraska case held that the essential ingredients of a lottery — consideration, chance, price, and means of disbursement — were embraced in the pari mutuel system and forbidden by the laws of that state. But the distinction between a lottery and a method of gambling was not discussed, because the Constitution and laws of that state applied equally to both subjects. The other cases possess no particular weight as authority upon the problem presented. The Britton Case was in effect overruled in Reilly v. Gray, 77 Hun, 402, 28 N. Y. S. 811, and the Maryland case dealt with an evasion of the lottery law by an attempt to simulate a race ticket which was unlawful in that state.

The evasion was held not to disguise the real transaction.

[1] It will be seen that the argument for the commonwealth depends upon a determination that a lottery, as understood by the people in framing and adopting the Constitution, included betting upon horse races by the pari mutuel system. There is no ambiguity in section 226 of that instrument in so far as forbidding lotteries is concerned, but manifestly the meaning, purpose, and reach of the words used must be deduced from the intention they express considered in the light of the history that pertains to the subject. "The terms used are to be construed according to their meaning at the time of the adoption of the Constitution rather than at any other time." Cooley's Constitutional Limitations, 69; 12 C. J. 706; 6 R. C. L. 51; 6 A. & E. Enc. of Law, p. 925; Collins v. Henderson, 11 Bush, 74; Myers v. United States, 272 U. S. 275, 47 S. Ct. 21, 71 L. Ed. 160.

Judge Cooley, in People v. Harding, 53 Mich. 481, 19 N. W. 155, 156, said that constitutional provisions must be interpreted with reference to "the times and circumstances under which the state constitution was formed – the general spirit of the times and the prevailing sentiments among the people. Every constitution has a history of its own which is likely to be more or less peculiar; and unless interpreted in the light of this history is liable to be made to express purposes which were never within the minds of the people in agreeing to it." Cf. Okanogan et al. v. United States, 279 U. S. 672, 49 S. Ct. 463, 73 L. Ed. 894, 64 A. L. R. 1434.

[2] At the time section 226 was being considered in the convention that framed the Constitution, an amendment was proposed forbidding every species of gambling. Volume 1. Debates of Constitutional Convention p. 1172. The delegate who proposed the amendment was asked whether his proposition embraced the prohibition of bet-

ting upon the speed of horses, to which he responded that it was his purpose to forbid all species of gambling and all games of chance in every conceivable form. He argued that all gambling was equally wrong, and that it was unfair to denounce gambling in the form of a lottery and to countenance it in other forms, such as betting upon horse races, and the like. The delegate from Lexington argued that it was not the appropriate place to deal with pooling privileges upon race courses, and other forms of gambling, because lotteries theretofore had been licensed by the Legislature, and the object of the pending section was not to deal with any other species of gambling, but to prohibit the Legislature from granting licenses to lotteries. The amendment was rejected, thus indicating that it was the intention of the Convention not to include in section 226 anything but lotteries of the type familiar at the time. The debates of a Constitutional Convention are not conclusive of the meaning of the Constitution, but it is proper to resort to them in order to ascertain the purpose sought to be accomplished by a particular provision where the language employed leaves the meaning in doubt. Higgins v. Prater, 91 Ky. 6, 14 S. W. 910, 12 Ky. Law Rep. 645.

"When the inquiry is directed to ascertaining the mischief designed to be remedied, or the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument. Where the proceedings clearly point out the purpose of the provision, the aid will be valuable and satisfactory." Cooley, Con. Lim. § 66, quoted by Judge Holt in 91 Ky. at page 17, 14 S. W. 910, 912.

The debates by individual members may be equivocal, but the decisions of the Convention itself are authoritative as to what it intended. Hood Rubber Co. v. Commissioner (Mass.) 167 N. E. 670, 70 A. L. R. 1, Annotation page 5; People ex rel. v. Emmerson, 302 Ill. 300, 134 N. E.

707, 21 A. L. R. 636. The General Assembly in March, 1892, enacted the present section 2573, Kentucky Statutes, making it a felony to set up, operate, promote, or to aid, assist, or abet any one in setting up a lottery or gift enterprise. In April, 1893, the General Assembly re-enacted section 1961, exempting from the provisions of section 1960 persons who may sell combination or French pools on any regular race track during the races thereon.

For many years prior to the adoption of our present Constitution, laws had existed for the prohibition of all lotteries, except those authorized by the Legislature. Many special acts had been passed to authorize lotteries for various purposes. The Kentucky Digest (volume 3, page 5470) contains a citation of many cases decided by this court upon various phases of the subject. The Constitution was framed to end that practice and to outlaw lotteries, and all schemes of that character. Commonwealth v. Douglass, 100 Ky. 116, 24 S. W. 233, 15 Ky. Law Rep. 581, 66 Am. St. Rep. 328; affirmed by the United States Supreme Court, 168 U. S. 488, 18 S. Ct. 199, 42 L. Ed. 553. The verbiage of section 226 comports with the contemporary construction given thereto. It speaks of "privileges granted," forbids "schemes for similar purposes" and all lottery "privileges or charters heretofore granted are revoked." Lotteries had become an evil of such vast proportions and corrupting influence that nothing less than absolute prohibition of them was deemed adequate.

In Douglas v. Kentucky, 168 U. S. 496, 18 S. Ct. 199, 201, 42 L. Ed. 553, Justice Harlan, speaking for the Supreme Court of the United States, said:

"This court had occasion many years ago to say that the common forms of gambling were comparatively innocuous, when placed in contrast with the widespread pestilence of lotteries; that the former were confined to a few persons and places, while the latter infested the whole community, entered every dwelling, reached every class, preyed upon the hard earnings of the poor, and plundered the ignorant and simple." Phalen v. Va., 8 How. (49 U. S.) 163, 12 L. Ed. 1030; Stone v. Miss., 101 U. S. 814, 25 L. Ed. 1079; Cf. Schroufe v. Com., 141 Ky. 554, 133 S. W. 205.

[3] It did not occur to any one during that period that betting on races, elections, or similar forms of wagering constituted a lottery. Indeed, the contention that betting on horse races by the pari mutuel system constitutes a lottery is of recent origin in this state. For nearly half a century the General Assembly and the Court of Appeals have proceeded upon the general understanding that the whole subject of betting and gaming was within the power of the Legislature to prohibit, regulate, or classify, prohibiting in part and permitting in part, according to its view of the public policy to be enforced. Upon the faith of such legislation and decisions, large investments have been made, and, although the Legislature may radically change the law, without regard to the consequences on a particular business (Clarke v. Haberle C. S. B. Co., 280 U. S. 384, 50 S. Ct. 155, 74 L. Ed. 498), it is a doctrine of almost universal acceptance that the courts will not, under such circumstances, overturn a long line of decisions. Commonwealth v. Louisville Gas Co., 135 Ky. 324, 122 S. W. 164; Halter v. Nebraska, 205 U. S. 34, 27 S. Ct. 419, 51 L. Ed. 696, 10 Ann. Cas. 525; New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 34 S. Ct. 167, 58 L. Ed. 332.

It might be fairly argued that the weight of authority is to the effect that lotteries do not embrace betting upon horse races by the pari mutuel system. 17 R. C. L. § 16, p. 1230; Reilly v. Gray, 77 Hun, 402, 28 N. Y. S. 811; People v. Fallon, 4 App. Div. 82, 39 N. Y. S. 865, affirmed 152 N. Y. 12, 46 N. E. 296, 37 L. R. A. 227, 57 Am. St. Rep. 492; Utah State Fair Ass'n v. Green, 68 Utah, 251, 249 P. 1016; People v. Reilly, 50 Mich. 384, 15 N. W. 520, 45 Am. Rep. 47.

[4] But, whatever may be the rule in other jurisdictions, we are bound by our own decisions and history upon the subject.

[5] Gaming, betting, and lotteries are separate and distinct things in law and fact, and have been recognized consistently as calling for different treatment and varying penalties. The distinctions are well developed, clearly marked, and in most instances rigidly maintained. Lotteries, 38 C. J. p. 285; 17 R. C. L. p. 1208; and Gaming, 12 R. C. L. p. 704; 27 C. J. p. 961; McDevitt v. Thomas, 130 Ky. 805, 114 S. W. 273; Brand v. Com., 110 Ky. 980, 63 S. W. 31, 23 Ky. Law Rep. 416; Cheek v. Com., 79 Ky. 359; Cheek v. Com., 100 Ky. 1, 37 S. W. 152, 18 Ky. Law Rep. 515; Bentler v. Com., 143 Ky. 509, 136 S. W. 896; Commonwealth v. Jenkins, 159 Ky. 80, 166 S. W. 794, Ann. Cas. 1915B, 170.

[6-8] That all forms of gambling are evil and characterized by vicious tendencies does not alter the fact of the individuality of each type. We are unable, in the face of the facts recited, to declare that the section of the Constitution condemning lotteries was understood by the people who adopted it as itself outlawing betting upon horse races, by the pari mutuel system, or the other forms of betting. It was then understood, and has been the accepted opinion, that the subjects of betting and gaming were within the absolute control of the police power, possessed by the Legislature. It is the duty and function of the Legislature to discern and correct evils, and evils within that power are not limited to some definite injury to public safety or morals, but embrace the removal of obstacles to a greater public welfare. The power is ample, coextensive with the duty, and equal to any exigency. Rast v. Van Deman, 240 U. S. 342, 36 S. Ct. 370, 60 L. Ed.

679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455. Slight reflection will be sufficient to convince the investigator that a different construction adopted now would render inconsistent, if not utterly useless, much of our legislation, and such a conclusion would be impossible to reconcile with numerous decisions of this court. The Legislature possesses the power to prohibit all the multitudinous forms of gambling, which includes the power to regulate, as well as the right to prohibit in part and regulate in part, provided that all persons in like situations and under the same circumstances and conditions are treated alike.

[9-11] It is urged that section 3 of the Bill of Rights, which prohibits the grant of exclusive, separate public emoluments or privileges, except in consideration of public services, invalidates section 1961, in that the exemption contained in that section confers a special privilege upon certain persons at a special time and place. By its terms nothing is granted or conferred upon anybody by that section of the statutes. It merely excepts from the operation of section 1960, which comprehensively condemns all the acts therein described, the persons who employ the pari mutuel system of betting on horse races within the inclosures while the races are being run. It amounts to a provision of law that one limited form of betting, under specified conditions and control, is not prohibited. It is a general provision, and applies alike to all persons coming within its purview. 12 C. J. § 833, p. 1116. It constitutes a legislative classification, and the only limitation upon the legislative power of classification is that it shall be founded upon some reasonable and actual distinction, and not arbitrarily made. Quong Wing v. Kirkendall, 233 U. S. 59, 32 S. Ct. 192, 56 L. Ed. 350; Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160. Subject to that limitation, the range of classification is as broad as the knowledge

and experience of the lawmakers and as extensive as the theater of human conduct. Grainger v. Douglas Park Jockey Club (C. C. A.) 148 F. 513, 8 Ann. Cas. 997; Jones v. Russell, 224 Ky. 390, 6 S.W.(2d) 460; Commonwealth v. Goldberg, 167 Ky. 96; Packard v. Banton, 264 U. S. 140, 44 S. Ct. 257, 68 L. Ed. 596; Radice v. N. Y., 264 U. S. 292, 44 S. Ct. 325, 68 L. Ed. 690; Owen County Burley Tobacco Society v. Brumback, 128 Ky. 137, 107 S. W. 710, 32 Ky. Law Rep. 916. That the Legislature could find a reasonable ground for putting racetrack betting in a separate class is plainly possible (State Racing Commission v. Latonia Agricultural Ass'n, 136 Ky. 173, 123 S. W. 681, 25 L. R. A. [N. S.] 905; 6 R. C. L. § 421, page 424; State v. Loomis, 75 Mont. 88, 242 P. 344; Clark v. Hartford Agricultural & Breeders' Ass'n, 118 Md. 608, 85 A. 503; State of Mo. v. James Thompson, 160 Mo. 333, 60 S. W. 1077, 54 L. R. A. 950, 83 Am. St. Rep. 468; Debardelaben v. State, 99 Tenn. 649, 42 S. W. 684; Douglas Park Jockey Club v. Talbott, 173 Ky. 685, 191 S. W. 474), and it must be assumed that the facts called for it.

"It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety." Chicago B. & Q. R. Co. v. McGuire, 219 U. S. 549, 31 S. Ct. 259, 55 L. Ed. 328; Rast v. Van Deman, 240 U. S. 342, 36 S. Ct. 370, 374, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455.

The Legislature is the judge of the wisdom and propriety of the classification of subjects of regulation, if there be any basis for it in the essential character or conduct of the things or persons classified. In 27 C. J. 1000, § 137, it is said: "Under some statutes betting upon a horse race is not an indictable offense, if the bet be made at a race course, or other place named in the statute." The author cites in support of the text: Everhart v. People, 54 Colo.

272, 130 P. 1076; Shreveport v. Maloney, 107 La. 193, 31 So. 702; State v. Dycer, 85 Md. 246, 36 A. 763; James v. State, 63 Md. 242; State v. Gemmel, 45 Mont. 210, 122 P. 268; People v. Fallon, 152 N. Y. 1, 46 N. E. 302, 37 L. R. A. 419; Debardelaben v. State, 99 Tenn. 649, 42 S. W. 684; Ransome v. State, 91 Tenn. 716, 20 S. W. 310; State v. Blackburn, 2 Coll. (Tenn.) 235; Huff v. State, 2 Swan (Tenn. 279; State v. Posey, 1 Humph. (Tenn.) 384.

The cases cited by the commonwealth upon this point are readily distinguishable. In Gordon v. Winchester Building & Accumulating Fund Ass'n, 12 Bush, 110, 23 Am. Rep. 713, and Kentucky Trust Co. v. Lewis, 82 Ky. 579, special corporate charters conferred special privileges, one to charge interest in excess of the legal rate that was open to others under the same circumstances, and the other to sell property held under mortgage without the intervention of a court of equity, as was required in all other foreclosures. Barbour, Sheriff, v. Louisville Board of Trade, 82 Ky. 645; Lancaster v. Clayton, 86 Ky. 373, 5 S. W. 864, 9 Ky. Law Rep. 611; and Commonwealth v. Makibben, 90 Ky. 384, 14 S. W. 372, 12 Ky. Law Rep. 474, 29 Am. St. Rep. 382, each involved an attempted exemption from taxation to which all others in similar situations were subject. In Barker v. Crum, 177 Ky. 637, 198 S. W. 211, 214, L. R. A. 1918F, 673, free tuition was arbitrarily granted to certain students of the Agricultural and Mechanical College for which all other students were charged. In the opinion we find: "It is true that the statute in question creates a class, but it does not treat all of that class alike; and its vice is found in that omission. If the statute had provided that all students of a certain age who passed the required examination should be entitled to enter the university upon equal terms and conditions as to the payment of fees and other expenses, it might be said that the statute was unobjectionable." It is plain that these cases were correctly decided, and that none of them aid in the solution of our present problem.

In Simpson v. Ky. Citizens' B. & L. Ass'n, 101 Ky. 496, 41 S. W. 570, 42 S. W. 834, 19 Ky. Law Rep. 1176, and Safety B. & L. Ass'n v. Ecklar, 106 Ky. 115, 50 S. W. 50, 20 Ky. Law Rep. 1770, general laws were condemned as conferring upon such associations the right to charge a greater rate of interest upon their loans than was permitted to other lenders of money by the general law regulating usury. The decisions proceeded upon the assumption that the classification adopted was arbitrary and unreasonable. The principle was correctly stated that classification was admissible when the law applied equally to all of a class, and a natural distinction supported the selection of the class. In the light of later experience and a clearer understanding of the character and purpose of building associations, it is now generally held that they may be put in a separate class for the purposes of taxation, regulation, and exemption from general laws. Cf. Mittendorf v. Goodale, 202 Ky. 118, 259 S. W. 59; Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 48 S. Ct. 423, 72 L. Ed. 770. The weight of authority now sustains a separate classification and treatment of building and loan associations. 12 C. J. p. 1118. It follows that the exception allowed by section 1961 is not obnoxious to section 3 of the Bill of Rights.

[12, 13] The argument respecting section 51 of the Constitution is that the title to the act now constituting sections 1960 and 1961 of the Kentucky Statutes contains no reference to the exception from section 1961 found in section 1961, and therefore the exemption is invalid. The bill was entitled "An act concerning gaming."

Under the Constitution, the subject of an act must be single, though the details thereof may be legion, so long as they are germane to the subject, which is required to be expressed in the title. It is sufficient if the title, although not a complete index of the contents of the act, fairly gives notice of the subject-matter dealt with therein. It is not the form of the legislation, but the subject thereof that must be embraced by the title. Allen v. Cromwell, 203 Ky. 836, 263 S. W. 356; Campbell v. Com., 229 Ky. 264, 17 S.W.(2d) 227, 63 A. L. R. 932; Wiemer v. Commissioner's Sinking Fund of Louisville, 124 Ky. 377, 99 S. W. 242, 30 Ky. Law Rep. 523. The title in this instance was general, and necessarily covered all matters concerning gaming, including that embraced as well as that excluded from the terms of the law. In Eastern Ky. Coal Lands Corp. v. Com., 127 Ky. 667, 106 S. W. 260, 271, 108 S. W. 1138, 32 Ky. Law Rep. 129, 33 Ky. Law Rep. 49, proceedings for the forfeiture of Virginia land grants, and numerous other matters, were held to be within the title of an act "relating to revenue and taxation." Manifestly the title here challenged was sufficient to embrace a delimitation of what was to be included in the broad denunciations of the act.

[14] Section 60 of the Constitution is not applicable, since no general act is repealed by any special or local act, and no city, town, district, or county is exempted from the operation of a general law. A casual examination of the cases decided under that section will demonstrate its inapplicability to the act in question here. Cf. Commonwealth v. Goldburg, 167 Ky. 96, 180 S. W. 68.

[15] Section 59 of the Constitution forbids the Legislature from passing any local or special act "to regulate the punishment of crimes and misdemeanors, or to remit fines, penalties or forfeitures" (subsection 4) or "in all other cases where a general law can be made applicable (subsection 29).

It is the contention of the commonwealth that the exemption in section 1961 of pari mutuel betting at certain times and places from the operation of section 1960 is a special act interdicted by these provisions. The argument is that the law does not apply to all persons alike and at all places alike. But the very statute that creates the offense provides that it shall not include a certain form of betting under certain circumstances, and that character of legislation is not forbidden. Stone v. Wilson, 39 S. W. 49, 19 Ky. Law Rep. 126; Singleton v. Com., 164 Ky. 243, 175 S. W. 372; Winston v. Stone, 102 Ky. 429, 43 S. W. 397, 19 Ky. Law Rep. 1483; Lakes v. Goodloe, 195 Ky. 240, 242 S. W. 632; Commonwealth v. Starr, 160 Ky. 267, 169 S. W. 743; 12 C. J. § 833, p. 1116. In Stratman v. Com., 137 Ky. 500, 125 S. W. 1094, 27 L. R. A. (N. S.) 949, 136 Am. St. Rep. 299, the court condemned as unconstitutional an act forbidding barbering on Sunday. It was deemed special legislation, for the reason that no reasonable basis could be found for singling out that one trade as the sole object of the law. The general law (section 1321) forbidding work on the Sabbath Day contains exceptions. It does not apply to work of charity or necessity, or to persons who observe another day of the week as a Sabbath. Such a classification is reasonable, and rests upon a substantial distinction. 12 C. J. p. 1118.

[16, 17] The effect of the contention that the exception of certain cases from its operation brought sections 1960, 1961, within the condemnation of Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 S. Ct. 431, 46 L. Ed. 679, would be to invalidate the entire act, not merely the exception. Cf. Felts v. Linton, 217 Ky. 305, 289 S. W. 312. That question, however, could be raised only by a person prosecuted under the act. Cumberland Pipe Line Co. v. Com., 228 Ky. at page 467, 15 S.W.(2d) 280. But neither the state nor the Federal Constitution prevents classification resting upon a distinction having some fair and substantial relation to the object sought to be accomplished

by the legislation. Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 35 S. Ct. 675, 59 L. Ed. 1119, L. R. A. 1915E, 953; Stratman v. Com., supra. Degrees of evil may afford a sufficient basis for varying treatment by the law. Jones v. Russell, 224 Ky. 397, 6 S.W.(2d) 460.

Certain other cases relied upon by the state may be briefly noticed. Columbia Trust Co. v. Lincoln Institute, 138 Ky. 804, 129 S. W. 113, 29 L. R. A. (N. S.) 53, involved an act which exempted from its terms cities of the first four classes. It also made the establishment of a charity to depend upon a vote of the people of the precinct where it was proposed to be placed. It was condemned as in violation of two express provisions of the Constitution. Cf. Washington ex rel. v. Roberge, 278 U. S. 116, 49 S. Ct. 50, 73 L. Ed. 210.

City of Louisville v. Kuntz, 104 Ky. 584, 47 S. W. 592, 20 Ky. Law Rep. 805, involved a six-month statute of limitations made especially for Louisville. It was plainly prohibited by subsection 5 of section 59 of the Constitution. It was not a matter that especially concerned the city in any particular justifying classification. Different limitations are provided for different remedies, and that is not improper. In James, Auditor, v. Barry, 138 Ky. 656, 128 S. W. 1070, 1072, the validity of an act fixing the salary of a tax assessor was assailed. The court said:

"When the subject-matter is purely one of municipal government, it is clearly competent for the Legislature to classify it alone upon number and density of population, as the Constitution implies if it does not expressly allow. When the subject is one that reasonably depends upon or affects the number and density of population as a correlative fact in the scheme of the particular legislation, then such classification is allowable. There are even perhaps other instances justifying such classification. But where the subject is one of general application throughout the state, and has been so treated in a general scheme of legislation, distinctions favorable or unfavorable to particular localities, and rested alone upon numbers and density of population, are invidious, and therefore offensive to the letter and spirit of the Constitution."

Droege v. McInerney, 120 Ky. 796, 87 S.W. 1085, 27 Ky. Law Rep. 1137, involved the validity of an act concerning elections in counties containing a city of the second class. It made an officer other than the sheriff umpire on the county election board whilst the sheriff performed that function in all other counties. It was held the act violated subsection 20 of section 59 of the Constitution. There was obviously no possible ground for the deviation from the general law. Cf. Felts v. Linton, 217 Ky. 305, 289 S. W. 312.

[18] Enough has been said to demonstrate that the authorities cited by the commonwealth do not support the argument that no reasonable or logical basis existed for the classification by the Legislature of racetrack betting. The difference between betting at a horse race within an inclosure when the races are being run and other forms of betting is palpable. The choice exercised by the General Assembly may have been an unwise one, but its power to make the choice is undoubted. The remedy must be sought where the power resides, and that is with the General Assembly of the state. The Constitution contains no provision to prevent the Legislature from dealing with the subject in its own way and according to its own view of public policy. The courts are not authorized to usurp the powers conferred upon another branch of the government, and, when the Legislature finds that the facts warrant a classification, and it has relation to the purpose of the law, is supported by a reasonable distinction, and op-

erates uniformly upon all within the class, the legislation is valid. Billings v. Illinois, 188 U. S. 97, 23 S. Ct. 272, 47 L. Ed. 400; Tanner v. Little, 240 U. S. 369, 36 S. Ct. 379, 60 L. E. 691; St. John v. N. Y., 201 U. S. 633, 26 S. Ct. 554, 50 L. Ed. 896, 5 Ann. Cas. 909; Atchison T. & S. F. Co. v. Matthews, 174 U. S. 96, 19 S. Ct. 609, 43 L. Ed. 909; Patsone v. Penn., 232 U. S. 138, 34 S. Ct. 281, 58 L. Ed. 539; Halter v. Nebraska, 205 U. S. 34, 27 S. Ct. 419, 51 L. Ed. 696, 10 Ann. Cas. 525.

The General Assembly need not make its regulations all-comprehensive, and it is not required to extend them to every possible case within their reach; but, in dealing with practical exigencies, it may be guided by experience. Miller v. Wilson, 236 U. S. 373, 35 S. Ct. 342, L. Ed. 628, L. R. A. 1915F, 829; Hall v. Geiger-Jones Co., 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643; Dominion Hotel v. Arizona, 249 U. S. 265, 39 S. Ct. 273, 63 L. Ed. 597.

All that is required in such cases is that the law shall operate alike upon all persons and property similarly situated, and be effective everywhere where like circumstances and conditions may be found. Maxwell v. Bugbee, 250 U. S. 525, 40 S. Ct. 2, 63 L. Ed. 1124; Walston v. Nevin, 128 U. S. 578, 9 S. Ct. 192, 32 L. Ed. 544; Southern R. Co. v. Greene, 216 U. S. 400, 30 S. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247; German Alliance Ins. Co. v. Hale, 219 U. S. 307, 31 S. Ct. 246, 55 L. Ed. 229; Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923; Buck v. Bell, 274 U. S. 200, 47 S. Ct. 584, 71 L. Ed. 1000.

Coming to consider the state of the law on the concrete question now under consideration, we find that text-writers and courts without exception acknowledge the right and power of the Legislature to exempt from the operation of statutes designed to suppress gaming designated places on described occasions, as will be seen from the text 27 C J. 1004, § 151, and following ones, and in 12 R. C. L. 724, § 24, and following ones. The general statements on the subject as contained in the first reference are: "In a number of jurisdictions the statutes either prohibit gaming in particular places, or on the other hand, provide that persons gaming at a particular place, such as a private residence, shall be exempted from prosecution under the statutes against gaming. * * * In some jurisdictions there are statutes prohibiting playing or betting in: Houses or places where spirituous or intoxicating liquors are retailed sold, or given away; taverns, inns, hotels, or restaurants; 'outhouses were people resort', gaming houses; highways; pool rooms, and race fields. Gaming in a public place, place of public resort, or public house, is also frequently prohibited."

The text in the latter reference (R. C. L.) states the principle in this language: "To convict one of the crime of gaming it is often necessary to show that the playing or betting occurred at some particular place, gaming at which is expressly prohibited by statute. This is because in many jurisdictions the statutes particularly enumerate the places at which gaming is illegal, thereby at least impliedly exempting from criminality playing or betting at all other places." Both are sustained by opinions from a number of courts, and which the reader may obtain by a reference thereto.

Likewise Mr. Freeman in an extended note to the case of State v. Mathis, 121 Am. St. Rep. 687, under the general title "Gambling Games and Devices," freely recognizes the right of the Legislature, in enacting such malum prohibita offenses, to exempt from punishment the denounced acts when engaged in at designated places and times pointed out in the statute, and in the same volume of R. C. L. supra, on page 718, § 17, it is pointed out that horse racing is a game, and that betting thereon comes within the purview of a statute against gaming generally, unless excluded expressly or by clear implication. No court holds that such exemptions, whether in a gaming or other penal statute, and when they penalize all persons similarly situated and their exemptions likewise apply to all persons similarly situated, violate in the least degree constitutional provisions such as are contained in section 3 of our Bill of Rights saying: "And no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services." Such conclusion is reached because that constitutional provision was never intended to apply to universal exceptions as above described, and which is of the character here involved, since the exempting statute in this case (section 1961 of our Statutes) embraces, not alone the operators of race tracks; not alone the owners of the horses that run the race; not alone the jockeys who ride them, nor any person or class of persons, but *all* "persons who sell combination or French pools on any regular race track during the races thereon." Any one and every one residing either in or out of the state who so engages at such places during the specified times is exempt from the operation of the statute.

[19] Neither does the fact that such exemption applies to only one device by which gambling is done under the general terms of the statute in section 1960 affect the validity of the exemption, since the truism that "the whole includes all of its parts" is thoroughly established and applied in the law as well as in the sciences. But in the notes to the text of Corpus Juris, supra, will be found cases where the exemption embraced only gaming by specified means, notwithstanding the general statute was levelled at gaming

engaged in, by, and through all means whatsoever, or by or through a number of named ones, in which case it is as competent to exempt gaming by one of the means at designated places and times as much as it is to exempt it if done by all of them at such places and times.

Analagous to the offense of gaming could be named a number of penal offenses in this jurisdiction, chief among which is the one denouncing drunkenness in certain places, and which this court has upheld in a number of opinions in which we said that it was not unlawful to be drunk at any of the places not designated in the statute. A number of other instances of an analogous nature could be cited, but what has been said is, according to the opinions of all members of the court, except Judge RICHARDSON, sufficient to show that the exemption contained in section 1961, supra, of our statute, was not beyond the power of the Legislature to enact; and whether or not it was proper or wise to do so is a question exclusively for its determination; there being no authority in the courts to do so after the power of the Legislature to so enact is established.

The court concludes that sections 1960 and 1961, Kentucky Statutes, are not in violation of any of the provisions of the Constitution mentioned.

Thus far the judges agree, except Judge RICHARDSON.

It is his view an incorrect interpretation is given to section 1960, and the proviso in section 1961 and sections 51 and 59 of the Constitution and their application to these sections. The constitutionality of the proviso in section 1961 is here presented for the first time. In the cases of Grinstead v. Kirby, 110 S. W. 247, 33 Ky. Law Rep. 287; Douglas Park Jockey Club v. Talbott, 173 Ky. 685, 191 S. W. 474; State Racing Commission v. Latonia Agricultural Ass'n, 136 Ky. 173, 123 S. W. 681, 25 L. R. A. (N. S.)

905; Jones v. Russell, 224 Ky. 390, 6 S.W. (2d) 460; Commonwealth v. Starr, 160 Ky. 260, 169 S. W. 743, the constitutionality of this proviso was not raised by the pleadings, discussed in the opinions, nor determined by the court. The court, passing its constitutionality, assumed that it was constitutional, and proceeded to discuss its operation and purpose.

The General Assembly may grant to classes of persons, or to professions, businesses, or occupations, exemptions from the operation of the general law. It may classify banks, building and loan associations, physicians, and surgeons, attorneys at law, insurance, or persons engaged in games within race-track inclosures or in houses, and other subjects. It may exempt persons from jury service, from working on public roads, or requiring registration as a qualification for voting, or labor unions from anti-trust statutes, or farmers peddling crops raised by them on property under their control; define and create public offenses, such as public drunkenness, or engaging in games whereby money may be bet, won, or lost, or the offense of setting up and operating, managing, and controlling gambling devices, with or without compensation, whereat money may be bet, won, or lost, or other offenses.

But such enactments granting such exemptions, or making such classifications, to conform to the Constitution of the state, must be enacted under appropriate titles, and not grant a special or exclusive privilege to any one or more of the class to which the same may be assigned as a class by the general law. The exemption must be allowed to all persons similarly situated and under like circumstances. To illustrate: The general law creating and defining the offense of public drunkenness cannot embrace a proviso that the general law shall not apply to persons intoxicated on "drug-store liquor"; or a general law prohibiting ordinary gaming, whereat money may be bet, won, or lost, cannot carry a proviso that it shall not apply to persons engaged in games of poker. Lakes v. Goodloe, 195 Ky. 242, 242 S. W. 632; King v. Com., 194 Ky. 143, 238 S. W. 373, 22 A. L. R. 535; 25 R. C. L. § 65, page 813; 12 C. J. § 873; page 1141; Singleton v. Com., 164 Ky. 243, 175 S. W. 372; Freund on Police Powers, § 26, page 21; Peonage Cases (D. C.) 123 F. 671; In re Langford (C. C.) 57 F. 570; Horwich v. Walker-Gordon Lab. Co., 205 Ill. 497, 68 N. E. 938, 98 Am. St. Rep. 254; Cooley's Const. Lim. (8th Ed.) vol. 2; Holden v. James, 11 Mass. 396, 6 Am. Dec. 174; Bull v. Conroe, 13 Wis. 233.

The General Assembly undertook to suspend the general law of limitations in certain cases by providing that in such cases the period of limitation should be six months. It endeavored to suspend the general law which fixed the rate of interest at six per cent, by an enactment wherein it was provided that a certain business should have a right to collect a higher rate of interest than six per cent. It passed an act fixing the jurisdiction of county courts differently in different counties. It provided for the collection of a license fee from persons engaged in certain occupations, and fixed the license rate differently in different cities. By another act it authorized the selection of two pupils from each of the 120 counties and conferred on them certain privileges while attending the Agricultural and Mechanical College at Lexington. The effect of these acts was to take out of the classes to which the subjects had been assigned by the general law, and exempt a particular certain one of a class to which the general law had assigned it. It was held by this court that these acts were invalid. Gordon v. Winchester, 12 Bush, 110, 23 Am. Rep. 713; Henderson, etc. v. Johnson, 88 Ky. 197, 10 S. W. 787, 10 Ky. Law Rep. 830, 3 L. R. A. 289; Simpson v. B.

& L. Ass'n, 101 Ky. 496, 41 S. W. 570, 42 S. W. 834, 19 Ky. Law Rep. 1176; Lynn v. Bullock, 189 Ky. 604, 225 S. W. 733; Stratman v. Com., 137 Ky. 500, 125 S. W. 1094, 27 L. R. A. (N. S.) 949, 136 Am. St. Rep. 299; City of Louisville v. Kuntz, 104 Ky. 584, 47 S. W. 592, 20 Ky. Law Rep. 805; Gorley v. City, 104 Ky. 372, 47 S. W. 263, 20 Ky. Law Rep. 602; City of Louisville v. Seibert, 51 S. W. 310, 21 Ky. Law Rep. 328; Barker v. Crum, 177 Ky. 637, 198 S. W. 211, L. R. A. 1918F, 673; Hager v. Walker, 128 Ky. 1, 107 S. W. 254, 32 Ky. Law Rep. 748, 15 L. R. A. (N. S.) 195, 129 Am. St. Rep. 238.

Section 1960 groups together certain gambling contrivances, having certain qualities and characteristics in common, distinguishing them, by reason thereof, from other gambling devices, and prescribes a penalty for setting up and operating the same. In the case of Commonwealth v. Simonds, 79 Ky. 618, combination or French pools was one of the contrivances declared by this court to be embraced by this section. Standing alone, section 1960 is a general criminal statute classifying or grouping together the gambling devices comprehended by it. The effect of the proviso in section 1961 is to take out of this group or class of gambling contrivances and exempt it or those who engage in setting up and operating combination or French pools from the operation of section 1960. Whether the proviso be regarded as exempting from the statute one only gambling device embraced by it, or the persons who operate it, from its operation, in either event, it is a suspension of the general criminal law to such one contrivance or such persons who set up and operate it, and this constitutes as to either of them, or both, special class legislation.

For the same reason that the General Assembly was without constitutional authority to exempt one or more or a class from the operation of the general law prescribing the rate of interest and statute of limitation, and other subjects, in the cases supra, it was without constitutional authority to exempt such one only gambling device, or the persons who set up and operate it. The General Assembly under appropriate title, may classify racetrack inclosures and all persons thereon during the running of the regular races. State v. Rose, 40 Mont. 70, 105 P. 82; Debardelaben v. State, 99 Tenn. 649, 42 S. W. 684. The sections of the Montana and Tennessee statutes exempt all persons within the race-track inclosure from the operation of the act of which they were respectively a part. The statutes involved in those cases make "two classes of betting or wagering persons—those within and those without the inclosure, the former are exempt, and the latter are liable."

The General Assembly recognized this principle when it enacted section 3914b—6, and the provisions in section 1328a, wherein it is provided: "The provisions of the act shall not apply to [race horse track] inclosures during regular race meetings or such inclosures wherein horse racing is being conducted," etc.

The proviso in section 1961 is not similar or alike, either in phraseology or in scope or meaning, the Tennessee and Montana statutes, nor sections 3914b—6 and 1328a, supra. It is not susceptible to the interpretation or the application given by the courts to the statutes involved in the Montana and Tennessee cases.

To be included in the exempted classes of section 1961, the act of setting up and operating of combination or French pools is a prerequisite. The express language of the proviso selects a few persons from the multitude on the race track and awards to them a special privilege not afforded by law to all other persons of the multitude of persons thereat, but denies to them the immunity so granted to the few. Thus the proviso divides the persons on race tracks during regular races thereon into two classes of persons on the race track: (a) Persons setting up and operating combination or French pools; (b) persons not engaged in so doing, and gives immunity to the one and denies it to the other, without regard to whether such other persons may or may not engage in setting up and operating one or more of the other games or contrivances. If those not present during the regular races thereon be regarded, such constitutes a division of all persons into three classes instead of two classes as above indicated. If it exempted all persons within the race-track inclosure during the running of regular races thereon from the provisions of the act, it might be regarded as a classification of persons on or within race-track inclosures.

The immunity is offered, not because such persons are within the race-track inclosure, or engaged in the business of breeding and growing blooded horses, or in racing such horses, but because they sell combination of French pools. This constitutes a statutory, discriminatory classification of persons, if not one only of a gambling contrivance.

The title of the act of which section 1960 and 1961 are a part is in this language, "An act relating to gambling." To interpret it as creating and defining a classification of persons or business or professions, or a racetrack inclosure or persons within such inclosure is unauthorized by the plain, simple language, found in the proviso. The classification of a business or a profession, or of persons engaged in a business or profession, not within itself illegal or vicious, cannot be constitutionally enacted under a title, "An Act to regulate gambling." The Legislature was without constitutional authority to classify a business, a profession or an occupation, whether that of doctor, lawyer, merchant, or person engaged in breeding and growing blooded horses, or in racing horses on race tracks or race-track inclosures, under such title, for neither of them in its nature is of kith or akin to the subject of the title.

It is a general rule, which has been repeatedly and often announced and followed by this court, that the title to each constitutional enactment must be fairly expressive of the contents of the act, and has to be read in connection with it in determining the meaning of the act. Commonwealth v. Barney, 115 Ky. 475, 74 S. W. 181, 24 Ky. Law Rep. 2352; Joyce v. Woods, 78 Ky. 386; Duke v. Boyd County, 225 Ky. 112, 7 S.W. (2d) 839.

No person reading the title, "An act to regulate gambling," could have the opinion that any provisions thereof accorded a prerogative, or afforded protection to persons engaged in breeding, raising, and growing blooded horses, or owning, controlling, or operating a race track, or engaged in racing thereon. The title does not cover either of these subjects in a general way or at all, and, in so far as the body of the act relates to either of these subjects, the title is misleading, because in reading it the reader would not be conveyed the idea that the body of the act relates to any of these subject-matters. Neither of them is germane to the subject mentioned in the title. It points out specifically the nature of the legislation it is proposed to enact, and, if the proviso in section 1961 be interpreted to include any of these subject-matters, it goes beyond the title, and deals with substantial subjects or things outside of those specifically presented in the title.

Illustrative cases supporting this insistence and in which this court has held acts invalid because the title was defective in the respects indicated are: Henderson Bridge Co. v. Alves, 122 Ky. 46, 90 S. W. 995, 28 Ky. Law Rep. 994; Wiemer v. Commissioner's Sinking Fund of Louisville, 124 Ky. 377, 99 S. W. 242, 30 Ky. Law Rep. 523;

Board of Trustees v. Tate, 155 Ky. 296, 159 S. W. 777; Thompson v. Com., 159 Ky. 8, 166 S. W. 623; Burton v. Monticello & Burnside Turnpike Co., 162 Ky. 787, 173 S. W. 144; Exall v. Holland, 166 Ky. 315, 179 S. W. 241; Bosworth, Auditor v. State University, 166 Ky. 436, 179 S. W. 403, L. R. A. 1917B, 808; Houston v. Boltz, Judge, 169 Ky. 640, 185 S. W. 76; Ogden v. Cronan, Sheriff, 171 Ky. 254, 188 S. W. 357; South v. Fish, 181 Ky. 349, 205 S. W. 329; Wood v. Com., 225 Ky. 294, 8 S.W. (2d) 428; City of Owensboro v. Hazel, 229 Ky. 752, 17 S.W. (2d) 1031. The last pronouncement of this court interpreting section 51 of the Constitution is Wood v. Com., 225 Ky. 294, 8 S.W. (2d) 428.

Applying these principles to the interpretation of the title "An Act relating to gambling," and giving due respect to section 51 of the Constitution, the title cannot be interpreted to include the subject-matter of breeding, growing, or raising blooded horses, or owning or operating a race track, or as affording a privilege to those attending or present at or engaged on race tracks during regular races thereon.

The proviso in section 1961 is invalid for the reasons hereinbefore stated. The act of which section 1961 is a part is complete within itself, excluding the proviso; the declaring of the proviso invalid on the ground that it is within the inhibitions of the state Constitution, the remainder of the act remains in force. Black's Const. Laws, § 43, p. 75; Cooley's Const. Lim. (8th Ed.) vol. 2, 809, 810; State Insurance Board v. Greene, 185 Ky. 196, 213 S. W. 218; Sinking Fund Com'rs v. George, 104 Ky. 260, 47 S. W. 779, 20 Ky. Law Rep. 938, 84 Am. St. Rep. 454; Thompson v. Com., 159 Ky. 8, 1966 S. W. 623. Such are the reasons for Judge RICHARDSON not concurring with the majority upon the constitutional questions mentioned.

[20-22] 2. The commonwealth sought injunctive relief upon two grounds. One of them was the use of the pari mutuel machine for the purpose of betting, but, since we have held such betting to be authorized by valid statutes, we need only to consider on this branch of the case whether injunctive relief may be awarded on the other allegations of the petition. The prayer of the petition was for an injunction against maintaining a nuisance by the operation of a pari mutuel system of betting, and the defendants be enjoined from intimidating, coercing or attempting to influence their employees to vote for or against any candidate in any primary or general election, and that the defendants be enjoined from contributing to the campaign expenses, and from aiding and assisting any candidate for office. A court of equity will not grant an injunction to prevent a violation of criminal or penal statutes not involving the use of property, or the breach of contracts, or the maintenance of a public nuisance. The statute itself is a standing injunction against a violation of its provisions, and it is not within the province of a court of equity to restrain criminal acts not concerned with contracts or the use of property for illegal purposes. Erlanger Kennel Club v. Daugherty, 213 Ky. 648, 281 S. W. 826; Repass v. Com., 131 Ky. 807, 115 S. W. 1131, 21 L. R. A. (N. S.) 836; Commonwealth v. Ruh, 173 Ky. 771, 191 S. W. 498, L. R. A. 1917D, 283; Commonwealth v. McGovern, 116 Ky. 212, 75 S. W. 261, 25 Ky. Law Rep. 411, 66 L. R. A. 280. Cf. City of Louisville v. Louisville Home Tel. Co., 149 Ky. 234, 148 S. W. 13, Ann. Cas. 1914A, 1240.

In some cases injunctions or other equitable remedies have been authorized by statute (see section 2554a—13, Kentucky Statutes; Clark v. Com., 204 Ky. 740, 265 S. W. 280; also section 3941m—11, Ky. Stats.), but such statutes afford no aid in this instance.

The Supreme Court of the United States in Re Debs, 158 U. S. 564, at page 593, 15 S. Ct. 900, 909, 39 L. Ed 1092, said:

"A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law."

It is apparent, therefore, that the allegations of the petition do not warrant the issuance of an injunction to restrain acts which would constitute a violation of the act to prevent corrupt practices, or participation by corporations in primary or general elections. Ky. Stats. §§ 1574a–1 to 1574a–3. But the conclusion announced would not preclude the court in formulating a judgment in a quo warranto proceeding from including, if deemed proper, an injunction affecting future conduct.

3. We pass now to the second ground upon which a forfeiture of the charters of the appellees was sought; namely, that they had committed offenses against the statutes of the state designed to prevent and to punish corrupt lobbying and pernicious political activities.

Since the charter of the Kentucky Jockey Club was voluntarily surrendered in January, 1928, and before the filing of this suit, of course the commonwealth does not expect by this action to obtain a forfeiture of that particular charter, but inasmuch as it contends that, although no forefeiture can be decreed, yet in quo warranto proceedings a substantial fine may be imposed along with, or in lieu of, a decree of forfeiture of charter, a question to be presently discussed, it becomes necessary to determine whether the charter of the Kentucky Jockey Club, had it not been surrendered, could have been forfeited on the allegations in the petition if established by proof.

[23] In so far as the ground for forfeiture now under discussion is based on pernicious political activities, Chief Justice LOGAN and Judges CLAY, DIETZMAN, and REES are of this opinion: The acts charged in the petition are those embraced and denounced in section 150 of the Constitution and sections 1574a—1, 1574a—2, 1574a—3, 1565b—1 and 1565b—2 of the Statutes, the latter being commonly called the Corrupt Practices Acts. By the express terms of that section of the Constitution and of the statutes themselves, it is provided that, on conviction for any of the offenses embraced therein, the corporation shall, in addition to the payment of the fines imposed by statute, forfeit its charter. Such being the case, these judges are of the opinion that, before a forfeiture can be based on any of these offenses, there must first be obtained in a criminal proceeding a judgment of conviction for their commission. In the case of Commonwealth v. Hearon, 235 Ky. 681, 32 S.W. (2d) 21, the commonwealth was proceeding under section 480 of the Civil Code of Practice to forfeit the office of Hearon as member of the county board of education of Webster county because, as the petition alleged, he had on divers and sundry occasions ridden on the Illinois Central Railroad on a free pass, in violation of section 197 of the Constitution providing that a public officer who accepts and uses a free pass shall forfeit his office, and in violation of section 201c—1 et seq., of the Kentucky Statutes, providing that the use of a free pass is a misdemeanor, on conviction for which the public officer shall, in addition to specific penalties, forfeit his office. It was held the commonwealth could not, in the absence of a conviction for the offense or series of offenses set out in the petition, forfeit the office of Hearon. A like

result was reached in Sweeney v. Coulter, 109 Ky. 295, 58 S. W. 784, 22 Ky. Law Rep. 885, where only the constitutional provision above mentioned was involved, and which does not expressly require a conviction in order to forfeit the office.

In the instant case, not only the statutes but also the Constitution itself requires as a condition precedent to the forfeiture of the charter that the corporation be convicted of the specified offense or offenses. In the Hearon Case, it was held that there could be no forfeiture of office in the absence of a conviction, and the Coulter Case likewise so held, even though the constitutional provision there involved did not specifically call for a conviction as a condition precedent. Under the authority of these cases, the judges named are clearly of the opinion that this ground cannot avail the commonwealth, in the absence of a conviction, and, as such is not alleged in the petition, such ground cannot be relied upon. Judges RICHARDSON, THOMAS, and WILLIS, however, are of the opinion that the provisions of particular penal statutes passed pursuant to a mandate of the Constitution do not exclude the remedy by a proceeding in the nature of a quo warranto or condition its applicability upon a conviction which is required before a forfeiture in a prosecution under the statute. The remedy now invoked proceeds also from a constitutional mandate. Section 205. The civil remedy is thought to be an additional and available means of enforcing the public policy of the commonwealth, and it is entitled at its election to pursue both remedies. State v. Capital City Dairy Co., 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181, affirmed 183 U. S. 238, 22 S. Ct. 120, 46 L. Ed. 171; State v. Nebraska Distilling Co., 29 Neb. 700, 46 N. W. 155; State v. Gamble-Robinson Co., 44 N. D. 376, 176 N. W. 103, 9 A. L. R. 98; State v. Delmar Jockey Club, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539; Com. of

Pa. v. American Baseball Club, 290 Pa. 136, 138 A. 497, 53 A. L. R. 1027; State v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902, affirmed 224 U. S. 270, 32 S. Ct. 406, 56 L. Ed. 760, Ann. Cas. 1913D, 936; Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079; Com. ex rel Schaffer v. Wilkins, 271 Pa. 523, 115 A. 887, 19 A. L. R. 1379.

Conforming to the great weight of authority, this court said in Commonwealth v. Newport, L. & A. Turnpike, 97 S. W. 375, 376, 29 Ky. Law Rep. 1285:

"We do not mean to be understood as holding that under no circumstances would such acts of misuse of its charter privileges by appellee as are charged in the petition not justify a forfeiture of its charter, for they might be purposely continued and willfully persisted in under circumstances of such aggravation as to result or threaten irreparable injury to the public, which could not be remedied or prevented by the ordinary penalties that may be inflicted for such acts of wrongdoing by the courts of criminal jurisdiction."

No implication curtailing the power of the commonwealth to invoke appropriate remedies should be indulged. 32 Cyc. 1417; People v. Londoner, 13 Colo. 303, 22 P. 764, 6 L. R. A. 444. Several remedies to redress wrongs to the public should be regarded as cumulative. And, even if the forfeiture should be denied by the court on that sole ground, the violation of those statutes could be considered in connection with other grounds justifying the application of the remedy. The opposite construction maintained by the majority tends to nullify section 205 of the Constitution, which requires the General Assembly, by general laws, to provide for the revocation of forfeiture of the charters of all corporations guilty of abuse or misuse of its franchises, or when such corporations become detrimental to the interest and welfare of the commonwealth or its citizens. This section of the Constitution is consistent with the authorities mentioned, in that no previous conviction is necessary, and must mean that the civil remedy was not affected by the policy declared respecting criminal proceedings. Such is the opinion of the minority judges named.

[24-27] Coming now to that part of ground 2 designated as "corrupt lobbying," Chief Justice LOGAN and Judges CLAY, DIETZMAN, and REES are of the opinion that the allegations in the petition as amended are insufficient though established by proof to work a forfeiture of the charters of the Latonia Jockey Club and of Churchill Downs. These allegations are:

"Plaintiff avers that shortly after the incorporation of the defendant, Kentucky Jockey Club, and the selection of its officers, agents and employees, there commenced an agitation for the repeal of the exemption in section 1961 of the Kentucky Statutes.

"And afterwards various bills were introduced in the General Assembly at each session providing for a repeal of said law and the defendants, and each of them, in order to defeat these bills, employed various and sundry persons to attend each and every session of the General Assembly and, either directly or indirectly, furnished to these lobbyists and agents large sums in cash for the purpose of debauching and controlling any and all members of the General Assembly which it could by such practices, influence to vote against the repeal of the said law."

It will be remembered that the petition as amended was filed on March 29, 1929. The Kentucky Jockey Club was dissolved in January, 1928, and Churchill Downs and the Latonia Jockey Club, according to the allegations of the petition, then came into being. The courts judicially know that the only session of the General Assembly held since the dissolution of the Kentucky Jockey Club was that of 1928, and it was about a third over when that club was dissolved. Hence, so far as the Latonia Jockey Club and Churchill Downs are concerned, they simply could not have attended any session other than the 1928 session, although the Commonwealth alleges they attended every one since the incorporation of the Kentucky Jockey Club. A reading of the allegations above quoted discloses that it is not alleged that any of the lobbyists and agents alleged to have been employed by any of the appellees debauched or controlled any member of the General Assembly by the use of the money alleged to have been furnished them or otherwise, or that any such agent or employee even attempted at any time to debauch or control any member of the Assembly by the use of such money, or otherwise, or that and such lobbyist or agent even attended any session of the General Assembly. Even if the fundamental rule of pleading that a pleading must be construed most strongly against the pleader be ignored, a liberal construction of these allegations amounts to nothing more than that the Clubs entertained an intention to corruptly lobby, but never carried that intention into action. On these allegations, Judges CLAY and DIETZMAN are of the opinion that nothing is alleged against any of the appellees warranting a forfeiture, since intention without some action is not to be so punished. Chief Justice LOGAN and REES agree with Judges CLAY and DIETZMAN in so far as the Latonia Jockey Club and Churchill Downs are concerned, since there was no persisitent course of conduct on their part extending over a series of General Assemblies, and the petition does not allege that either of these clubs intended to continue any illegal practice alleged to have been committed by the entucky Jockey Club. It is true the petition does allege that the two new clubs intended to carry on the business that the Kentucky Jockey Club had been doing, but this allegation was made in connection with the allegation of the petition bearing on the pari mutuel betting, and plainly had reference only to that. Thereafter in the petition, whenever the commonwealth alleged anything it conceived to be an illegal practice, it specifically charged each defendant with that practice, thus indicating that it did not regard the general allegation about carrying on the business as covering anything other than the pari mutuel betting. But, in so far as the Kentucky Jockey Club is concerned, Chief Justice LOGAN and REES are of opinion that enough is alleged to show such a continuing and persistent intention on its part to corrupt the General Assembly as to warrant a forfeiture of its charter had it not been surrendered.

Judges RICHARDSON, THOMAS, and WILLIS are of the opinion that the allegations are sufficient to forfeit the charter of all three appellees because the dissolution of the charter of the parent company and the creation of new corporations to continue the same business in the same manner, with the same property, for the same purposes, and for the benefit of the same persons, should not affect the case at all. Rather it should constitute a confession that the original position of the Kentucky Jockey Club could not be defended. They are of the opinion that the case should be tried as if the new expedient had not been resorted to by the defendants. The right of the commonwealth to inquire into the character of past conduct, or to invoke the power of the court to visit appropriate restrictions upon future action, should not be defeated or forestalled by any subterfuge or manipulation of the property and franchises of the corporations. The action to forfeit the charters and franchises should not be defeated or delayed by a mere dissolution of one corporation so long as the challenged conduct is continued. The liability of the creature corporations is not limited merely to assets received, but they are subject to such remedy as the court may adopt to stop the alleged illegal business. Skirvin

Operating Co. v. Southwestern Electric Co., 71 Okl. 25, 174 P. 1069, 15 A. L. R. 1106, annotation page 1148.

It is not to punish the new corporation for the acts of the old one, but to reclaim the misused franchise entirely, or to restrain its future use within proper bounds in the hands of its owners. If a fine should be adjudged, as it might be as an incident to any relief granted, the creature corporations are liable for its payment. Skirvin Operating Co. v. Southwestern Electric Co., 71 Okl. 25, 174 P. 1069, 15 A. L. R. 1106. The corporate charter is one thing; the right to engage in business is another. And, so long as the managers of the business persist in carrying it on, the power of the commonwealth should be ample to restrain it within legal limits. The criminal remedies may be sufficient as punishment, but the civil remedy to prevent a continuance of acts detrimental to the public interest should not be denied.

[28-31] We come now to ground 3 relied upon for a forfeiture; namely, that these companies had committed acts and engaged in transactions not prohibited or punished by any particular statute, but detrimental to the public welfare, and violative of the implied and express contracts upon which the continuance of the corporate franchises were conditioned and which constituted an abuse and misuse of powers. All the judges agree that these allegations are insufficient.

As to some of the allegations under this head, the petition itself shows that they could not be true of the Latonia Jockey Club and Churchill Downs, as, for instance, the charge that they had sold some of their stock on credit when it had already been alleged that they had transferred their entire capital stock to the American Turf Association, a Delaware corporation, in consideration of the Kentucky Jockey Club turning over to them its assets in Kenton and

Jefferson counties, respectively. Nor, indeed, is the sale of the stock on credit a violation of the statutes or Constitution. It is expressly permitted by section 543 of the Statutes. -In he event of insolvency, the creditors would, under the decisions of this court, clearly have the right to require the unpaid portion of the subscriptions paid in, and so no right of theirs would be affected by a sale on credit. The allegations that the companies purposed establishing a monopoly of the race-track business are not sufficient. They are such allegations as are thus dealt with in Mattingly v. Brents, 155 Ky. 570, 159 S. W. 1157, 1160:

"Equally without merit do we regard the claim set up in the answer of the appellant Brown that the object, with which appellee leased the livery stable in controversy was to secure a monopoly of the livery business. In the form alleged, this allegation is a mere conclusion of the pleader. It does not allege that the acquisition of this stable by appellee would in fact give him the control of the livery business in the city of Labanon or that it would result in his unreasonably increasing the charges for livery service or would put him in a position to do so."

There is nothing in the allegations about the issuance of free passes by these companies or their efforts to obtain favorable publicity for their business in the newspapers warranting a forfeiture. The companies, if they so desired, had a right to issue free passes. If such issuance trenched upon any violation of the Corrupt Practice Act, what has heretofore been said in connection with those offenses is applicable. Equally is that true of the allegations concerning the organization of appellee's employees into publicity committees during political campaigns. As to the allegations of investment by the appellees of their capital and surplus in stock of other corporations, there being no allegations that such is not authorized by the charters of the company, they are not sufficient to raise any question of illegality. However, Judges RICHARDSON, THOMAS, and WILLIS are of the opinion that the petition on the whole alleges enough to withstand a demurrer. Pleadings in quo warranto are anomalous. Bouvier Law Dict. vol. 3, p. 2788. A complaint must allege sufficient facts to show a perversion, misuse, or abuse of the corporate powers. 5 Thompson on Corporations (2d Ed.) § 5810.

This court in Commonwealth v. Newport, etc., Turnpike Co., 97 S. W. 375, 29 Ky. Law Rep. 1285, held that the remedy of quo warranto should not be invoked when other sufficient remedies to correct the evils complained of had not been utilized, unless allegations were made to the effect that the misconduct was willful and repeated. The opinion quoted 10 Am. & Eng. Enc. of Law, 1279, to the effect that the information must state with precision every fact which constitutes the abuse of the franchises on which the demand for a forfeiture is predicated.

In 32 Cyc. 1448, it is said that such facts should be alleged as will make out a prima facie case for relief, and they should be alleged in traversable form, avoiding mere conclusions of law. But it is only necessary to set forth in general terms the wrongful acts or omissions complained of, and the ultimate facts may be alleged. Tested by these rules, the minority judges named regard the petition in this case as sufficient to support the inquiry, since it sets forth numerous acts not authorized by the charter, and habitual conduct detrimental to the public interest. It does not, in so many words, allege that the statutory penalties would be insufficient, or that the wrongful acts were willful and repeated. But it does allege a general course of conduct so described in the petition as to constitute such an abuse, misuse, and perversion of its powers and privileges and such a violation of statutes as necessarily implied a continuous disregard of its duties and conduct calculated to result in public injury. Cf. State v. Capital City Dairy Co., 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181.

The defendants themselves first thought the petition was sufficient to require an answer since they filed one. If it had been deemed necessary to have the allegations amplified, that could have been done by the court upon its own motion or upon the motion of the defendants. Civil Code of Practice, §§ 113, 114.

Standing alone, with its averments admitted, the three judges mentioned are of opinion that the petition makes out a prima facie case on a sufficient number of grounds to require a defense by all the defendants.

Since a majority of the court are of the opinion that, although no grounds are alleged upon which a forfeiture of the charters of the Latonia Jockey Club and Churchill Downs may be had, sufficient is alleged in the petition upon which to base a forfeiture of the charter of the Kentucky Jockey Club if established by proof had the Kentucky Jockey Club not been dissolved voluntarily as it was, it becames necessary to decide whether a fine can yet be imposed upon the Kentucky Jockey Club because of the acts alleged which would, if established by proof, have warranted a forfeiture of its charter, and, if so, may that fine be substantial in amount, what is its character, is it barred by limitations, and are the Latonia Jockey Club and Churchill Downs liable for it?

[32, 33] The right of the commonwealth to bring a civil action to forfeit the charter of a corporation exists by virtue of Kentucky Statutes, § 569, and Civil Code of Practice, § 480. The latter section reads:

"In lieu of the writs of scire facias and quo warranto, or of an information in the nature of a quo warranto, ordinary actions may be brought to vacate or repeal charters, and to prevent the usurpation of an office or franchise."

This provision substituting an ordinary action to forfeit a charter for the old method of procedure first appeared in the Code of 1854 as section 529. Before 1854 the writ of quo warranto was well known in Kentucky law. The first Code enacted in 1851 expressly provided that it should not affect the laws regulating proceedings in quo warranto. Section 664, subsection 12, Acts of 1850–51, pp. 203, 204. Both the writ of quo warranto and a writ of scire facias were part of Kentucky law before 1854, having come to us with the law of England. Taylor v. Commonwealth, 3 J. J. Marsh. 401; Commonwealth v. Lexington & Harrodsburg Turnpike Road Co., 6 B. Mon. 397. See West Publishing Company, Kentucky Digest, volume 17, title "Scire Facias."

The three writs mentioned in section 480 of the Civil Code of Practice and their functions at common law are explained in a note appearing in Cook on Corporations (6th Ed.) § 333, substantially as follows: The writ of quo warranto is an ancient writ employed by the king against any one who claims or usurps an office or franchise, or who, having had a right to the franchise, neglects to exercise it to inquire by what warrant he still claims to exercise it. The writ being dilatory and technical, it soon fell into disuse, and in its place grew up the information in the nature of a quo warranto. This proceeding was in its nature and in form a criminal proceeding, and by it the Attorney General proceeded on a twofold ground, both to punish the usurper and to prevent the unlawful exercise of its franchise. Scire facias was resorted to where there was no original defect in the charter as if a grant obtained by fraud. It may be used also in the case where the charter was valid but the powers of a corporation have been abused. The distinction taken in England is thus:

That a scire facias may be resorted to where a legal corporation, in full possession of its powers, abuses them while a quo warranto is applicable where a corporation from a defect in its Constitution becomes an imperfect body, but nevertheless continues to act as a corporation. The birth of the writ of quo warranto is buried in legal antiquity. It grew out of the necessities of the king to repossess a grant of franchise, sometimes because of misuse of the grant, but often again to replenish a depleted treasury. Rex v. London, 3 Hard. State Trials, 545. In the action, the burden rested on the respondent to establish the source of the grant, and this in the early history of England, because of the lapse of time and the unsettled condition of the government, became very hard to do, and forfeitures were sustained because the right could not be established. This served the purpose of grasping monarchs. To correct the abuses and to afford a fair hearing, the Statutes of Gloucester, 6 Edw. 1, 1278, were adopted. By them the right of trial before justices of the circuit was insured, and franchises resting on prescription were declared valid. The judgments of the justices in these actions were conclusive on the crown. 2 Coke Inst. 498. As stated, the information in the nature of quo warranto soon displaced the writ of quo warranto. This new writ in its inception not only provided for a forfeiture but also a fine in the discretion of the justices trying the cause. In an action of this character and in the writ of scire facias, the burden was not placed on the respondent to establish the grant. By the Statute of Anne, 9 Anne c. 20, passed in 1702, an information in the nature of quo warranto was for the first time permitted to be brought at the relation of a private person, and by section 5 of that act the court was authorized to enter judgment of ouster and fine. As this statute was passed almost 100 years after 4 James 1, it was, of course, never law in Kentucky. Commonwealth

v. Lexington & Harrodsburg Turnpike Co., supra. But it is argued that the statute furnishes strong confirmation of the conclusion that at common law the right to a substantial fine went with the information in the nature of quo warranto; that the statute was not meant to increase the penalty over that allowed upon an information filed by the Attorney General whose right to proceed by information was not abolished but continued side by side with the new right granted the private relator. However, it is clear that by the time of Blackstone the fine had become nominal in amount, for in 3 Blackstone's Commentaries, p. 263, it is said of and concerning an information in the nature of quo warranto:

"This is properly a criminal method of prosecution as well to punish the usurper by a fine for the usurpation of the franchise as to oust him and seize it for the Crown; both hath long been applied to the mere purposes of trying the civil right, seizing the franchise or ousting the wrongful possessor, *the fine being nominal only.*" (Italics ours.)

As is well known, the Commentaries of Blackstone, the first volume of the first authorized edition of which appeared in 1765, the work being completed within the course of the next four years, had a most profound influence on the legal education and the legal thought of the lawyers of this country of that day and for many years thereafter, for the circulation of his Commentaries on the American continent was as great as in England itself, if not greater. Whatever may have been the correct historical statement of the nature and extent of the fine of the common-law writ of an information in the nature of quo warranto, the influence of Blackstone upon the early legal thought of this country undoubtedly prevailed to the extent that the fine came to be regarded generally in American jurisprudence as being only nominal in amount and inflicted for the misdemeanor involved. Thus in

Fletcher's "Cyclopedia of the Law of Private Corporations" vol. 5, § 3271, p. 5038, it is said:

"The reference to the subject both in opinions and textbooks are few and casual. Usually Blackstone's statement that the writ is now used for the trying of the civil right, 'the fine being nominal only,' is repeated, and the general practice, as well as some American authorities, would seem to indicate that only a nominal fine can be imposed. In other states, however, the rulings are to the effect that a substantial fine may be imposed."

And in the case of Standard Oil Co. v. Missouri, 224 U. S. 270, 32 S. Ct. 406, 410, 56 L. Ed. 760, Ann. Cas. 1913D, 936, the Supreme Court, in upholding a substantial fine imposed by the state of Missouri in a quo warranto proceeding because no federal question was involved in the appeal, took occasion to say:

"But there are practically no decisions which deal with the nature and amount of the fine which can be entered in states where, as in Missouri, quo warranto is treated as a purely civil proceeding. The references to the subject, both in text books and opinions, are few and casual. They usually repeat Blackstone's statement (3 Com. 262) that the writ is now used for trying the civil right, 'the fine being nominal only.' Ames v. Kansas, 111 U. S. 470, 28 L. Ed. 490, 4 S. Ct. 437; Com. v. Woelper, 3 Serg. & R. [Pa.] 53; High, Extr. Legal Rem. 702, 697, 593. These authorities and the general practice indicate that in most of the American states only a nominal fine can be imposed in civil quo warranto proceedings."

In 22 R. C. L. 719, we find:

"The fine, however, fell to a nominal amount, and the proceeding became in almost all cases a civil one for the purpose of trying the right to a franchise or office."

And in 32 Cyc. 1414, it is said:

"But long before the American Revolution it lost its character as a criminal proceeding in everything except form and was applied to the mere process of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal merely; and such has always been its character in many states of the Union."

It must be conceded, however, that in some states the view as above outlined did not and does not prevail, notably Missouri, and that in them the fine which may be imposed may be substantial in amount.

[34] What is the situation in Kentucky? As to that, the court is not in entire accord. No case in this state prior to the adoption of section 480 in the Civil Code of Practice, or, as a matter of fact, since that time, has been found touching on the question whether a fine of any kind, substantial or otherwise, can be imposed in connection with a judgment of forfeiture of a charter in a quo warranto proceeding or in one brought under section 480 of the Civil Code of Practice. Of the court, Chief Justice LOGAN and Judge REES are of the opinion that, by section 480 of the Code creating the civil proceeding therein provided for, in lieu of the writs of scire facias, quo warranto, and information in the nature of quo warranto, the drafters of the Code intended that the forfeiture of the charter attendant upon the success of the commonwealth in such a proceeding should carry with it only those consequences then generally known, recognized, and understood as such consequences, and that as at that time it was generally thought in American jurisprudence that only a nominal fine could be imposed; none other can be. Judges CLAY and DIETZMAN are of the opinion that, whatever may be the right construction to put upon section 480 of the Civil Code of Practice clearly by the act of 1870 dealing with the incorporation of companies, their powers, privileges and duties, the Legislature intended to do away entirely with the feature of a fine, as a part of

the judgment in a proceeding brought to forfeit a charter. By section 10 of the Act of March 15, 1870, being chapter 729 of the Acts of 1869—70, and found on page 96, intentional fraud in failing or refusing to comply substantially with the articles of incorporation or in deceiving the public or individuals in relation to the assets and liabilities of a corporation is denounced, and by section 11 diversion of the funds of the corporation to other objects than that specified in the articles of incorporation and the payment of dividends unearned are denounced. By section 12 of that act it is provided:

"Either such failure or the practice of fraud in the manner hereinabove mentioned shall be cause of forfeiture of all the privileges hereby conferred, and any court of competent jurisdiction may, upon the application of the attorney for the Commonwealth, by a proceeding in the nature of a quo warranto, declare such forfeiture and close up the affairs of the company."

That section is now replaced by section 569 of the Statutes, a part of chapter 35 of the Acts of 1894, which reads:

"Whenever any corporation has failed, or shall fail, to perform or comply with any requirement or provision of its charter under which it does business in this State, or shall be guilty of an abuse or misuse of its corporate powers, privileges, or franchises, or shall become detrimental to the interest and welfare of the Commonwealth or its citizens, it shall be the duty of the Attorney-General of the State to institute such proceedings as may be proper and necessary to have forfeited and revoked the charter, powers, franchises and privileges of such corporation."

To Judges CLAY and DIETZMAN it seems clear that the Legislature by these acts intended to indicate the character of judgment to be entered when charters are forfeited for misuse or abuse of corporate powers, that by them it was intended to supplant whatever judgment might have been entered at common law, and that, as no fine was provided in either of them, no fine can now be imposed as a part of the judgment of ouster.

By its silence as to a fine in defining the character of judgment to be entered in a suit brought to forfeit a charter for an abuse or misuse of corporate powers, the Legislature, in the judgment of Judges CLAY and DIETZMAN, clearly intended to eliminate the matter of a fine. Judges RICHARDSON, THOMAS, and WILLIS are of the opinion that a substantial fine may still be imposed; their reasons being that, in a proceeding in the nature of a quo warranto, the court has a broad discretion as to the character and extent of relief to be granted. In 32 Cyc. 1434, it is said the judgment may be one of ouster of corporate franchises or as to particular powers. If the corporation is dissolved, the court may prohibit, by an injunction or other appropriate order, the continuance of the condemned business, and a fine may be imposed. Where the usurpation is not willful, the amount of the fine is generally nominal. But that also is in the discretion of the court. In 5 Thompson on Corporations, § 5824, it is said that the judgment may be one of ouster and dissolution which is equivalent to a judgment of seizure at common law. Gardner v. State, 77 Kan. 742, 95 P. 588; Reed v. Cumberland, etc., Canal Co., 65 Me. 132; People v. R. R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 33; State v. Village of Bradford, 32 Vt. 50. A judgment of ouster is proper, even though the wrongful acts have been discontinued before the trial. Hammer v. State, 44 N. J. Law, 667. The judgment may be a general ouster or a limited one with a fine accompanying it, or it may be a simple fine if that is deemed sufficient. 14a C. J. p. 1140; 22 R. C. L. §§ 45–47; State v. Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363; State v. Armour Packing Co., 173 Mo. 356, 73 S. W. 645, 61 L.

R. A. 464, 96 Am. St. Rep. 515; Weston v. Lane, 40 Kan. 479, 20 P. 260, 10 Am. St. Rep. 224; State v. Omaha & C. Bridge Co., 91 Iowa, 517, 60 N. W. 121.

The fine in many cases is merely nominal, but that does not indicate that the power of the court is so circumscribed. It means merely to describe the practice, and there can be no reason for imposing a nominal fine, unless it is designed to vindicate and preserve the power of the court to make the fine substantial, if deemed necessary to serve its purpose of prevention of a continuance of the wrong. The power of the court, in rendering a judgment, is equal to the exigency, and the judgment may be formulated in such terms as to accomplish a correction of the evil. The only limitation upon the power of the court is that imposed by the Constitution against unreasonable and excessive punishments. Standard Oil Co. v. Missouri, 224 U. S. 287, 32 S. Ct. 406, 56 L. Ed. 760, Ann. Cas. 1913D, 936; State of Ohio v. Capital City Dairy Co., 62 OhioSt. 350, 57 N. E. 62, 57 L. R. A. 181. In State v. Armour Packing Co., supra, the court cited a number of authorities to sustain the proposition that the character of the judgment rests in the sound discretion of the court. There a fine of $5,000 and costs was imposed, coupled with an injunction against doing business in the state, unless the fine and costs were paid within a specified period. The fine is a civil penalty to prevent the wrong, and is an incident of the remedy by quo warranto. In the opinion of the three judges mentioned, the courts of Kentucky possess the same power that inheres in the remedy as applied by the courts of other states, and is limited only by the considerations that control judicial discretion and by the provisions of the state and Federal Constitutions. Standard Oil Co. v. Missouri, supra, 224 U. S. 270, 32 S. Ct. 406, 56 L. Ed. 760, Ann. Cas. 1913D, page 936.

It is not necessary to discuss whether the fine is a pure punishment, damages for breach of implied and express contract, restitution of ill-gotten gains, or merely a preventive remedy deemed sufficient to correct the wrongful conduct. The formulation of a judgment suitable to the case is what is meant by leaving the matter to the discretion of the Court.

To sum up on this branch of the opinion, three of the members of the court are of the opinion that a substantial fine may be imposed, two that only a nominal fine may be imposed, and two that none at all can be imposed as a part of a judgment in a suit brought to forfeit a charter.

[35, 36] All the judges are agreed that at least under the allegation in the petition as amended, admitted by the demurrer, to the effect that among the other alleged purposes the Kentucky Jockey Club had, in order to defeat the collection of any money judgment which might be obtained against it in this action, transferred all its assets to the Latonia Jockey Club and Churchill Downs, the latter two companies are liable to the extent, at least, of the assets received by them for any such money judgment.

[37-41] Since a majority of the court are of the opinion that some fine may be imposed, it becomes necessary to discuss whether such a fine is criminal or penal in its nature, and therefore barred by the one-year statute of limitations (Kentucky Statutes, § 1138), or civil in its nature and therefore not barred at least under five years (section 2515). If the one-year statute applies, the judgment will have to be affirmed, as the petition fails to allege the acts complained of occurred within the year preceding the filing of the petition, a necessary allegation in a penal action. If the fine be civil in its nature, limitations must be pleaded as a defense, and cannot be taken advantage of by demurrer to the petition.

As to the nature of the fine, Chief Justice LOGAN and Judges REES, RICHARDSON, THOMAS, and WILLIS are of the opinion that the fine imposed is civil in its character, and hence is not governed or controlled by the one-year statute of limitations. The proceeding is now regarded as civil, whatever may have been its character at one time. In Thompson on Corporations (2d Ed.) vol. 5, § 5796, the rule is so stated and supported by a vast array of authorities.

In Ames v. Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. Ed. 482, and Foster v. Kansas, 112 U. S. 201, 5 S. Ct. 8, 97, 28 L. Ed. 629, the Supreme Court of the United States gave much consideration to the subject, and concluded that it was a civil action. Again in Standard Oil Co. v. Missouri, supra, and in Newman v. U. S., 238 U. S. 537, 35 S. Ct. 881, 59 L. Ed. 1446, the same conclusion was reached. See, also, 22 R. C. L., § 2, page 657 and 32 Cyc. 1414.

Indeed, the Civil Code of Practice, § 480, expressly provides for an ordinary action in lieu of the writs of scire facias and quo warranto and of an information in the nature of a quo warranto. Cf. Kirch v. City of Louisville, 125 Ky. 391, 101 S. W. 373, 30 Ky. Law Rep. 1356; Stack v. Com., 118 Ky. 481, 81 S. W. 917, 26 Ky. Law Rep. 343; Commonwealth v. Adams, 3 Metc. 7. These authorities leave no room for doubt that the ordinary action in lieu of an information in the nature of a quo warranto provides a civil remedy, which is unaffected by the character of the judgment that may be pronounced. The nature of the judgment does not determine the character of the action. It is the character of the action that determines the nature and scope of the judgment. However, Judges CLAY and DIETZMAN are of the opinion that at common law the fine in its inception was undoubtedly penal in its nature, being, as the books say, imposed for the misdemeanor involved, and that at least where, as here, there can be no forfeiture of the charter because the charter had been voluntarily surrendered but only the imposition of a fine nominal or substantial, it is penal in its nature, and hence controlled by the one-year statute of limitations. That the fine may be collected in a civil proceeding does not in their judgment render it any the less penal in its nature, for by the Code itself penal actions (admittedly criminal in their nature) are civil proceedings. Hence the nature of the proceeding does not necessarily determine the nature of the fine which is imposed in the proceeding. These two judges are unable to agree with the position taken by the Missouri court in the Standard Oil Company Case, supra, and the commonwealth in this suit, to the effect the fine imposed is not really a fine, but damages for the breach of contract; that is, a breach of an implied undertaking by the corporation not to misuse or abuse its corporate powers. It is true that the Supreme Court of the United States affirmed the Missouri court in the Standard Oil Company Case, which was decided by the Missouri court on that theory, but the Supreme Court did so on the ground that, under Missouri law, as determined by the Missouri courts, punitive damages can be recovered for the breach of an ordinary contract. The Supreme Court, however, was careful to point out that, by the overwhelming preponderance of authority, nowhere in the law, save in cases for the breach of a contract of marriage, are punitive damages allowed for breaches of contract. Nor, in the opinion of Judges CLAY and DIETZMAN, can the fine be assimilated to compensatory damages. There is no measure for such damages. Certainly, in their judgment, it could not be by way of any gain the corporation may have made because the fine may be imposed whether the corporation has gained or not; certainly not by any damage the commonwealth may have sustained because the commonwealth can recover without any showing of damages, or, if that be assumed, without showing its extent or character. In short, as Judges CLAY and

DIETZMAN view it, where the sole purpose left in the lawsuit is the imposition of a fine, it is simply the imposition of a penalty, the amount of which is left to the discretion of the judge, and that therefore the one-year statute of limitations as provided in section 1138 of the Statutes applies.

[42] All the judges of the court are agreed that a case will not be reversed to enable a party to recover nominal damages only. Elder v. Florsheim Shoe Co., 209 Ky. 509, 273 S. W. 60; Vansant v. Ashland Waterworks Co., 200 Ky. 586, 255 S. W. 132; Stone v. Adams Express Co. (Ky.) 122 S. W. 200. Therefore, as Chief Justice LOGAN and Judge REES think that the allegation of the petition, even if established, would entile the commonwealth to nominal damages only and as Judges CLAY and DIETZMAN think that no fine can be imposed, it follows that the judgment must be affirmed.

The conclusion of the court, and the views of the individual judges, may be summarized as follows:

(1) All of the judges concur that betting on horse races by the pari mutuel system does not constitute a lottery within the meaning of section 226 of the Constitution.

(2) All of the judges, except Judge RICHARDSON, agree that sections 1960 and 1961 of the Kentucky Statutes do not violate sections 3, 51, 59 or 60 of the state Constitution. Judge RICHARDSON is of the opinion that they do violate sections 3, 51, and 59.

(3) All of the judges agree that injunctive relief may not be granted to prevent the violation of penal statutes not concerned with contracts or the use of property for the creation of a public nuisance.

(4) A majority of the court is of the opinion that the charters of the defendant corporations could not be forfeited for the alleged violation of section 150 of the Constitution, or of the statutes passed pursuant thereto, because

a conviction for the offenses thereby created is a condition prerequisite to a forfeiture thereunder. Judges RICHARDSON, THOMAS and WILLIS are of the opinion that the remedy in the nature of quo warranto is additional and cumulative, and not conditioned upon prior prosecution or conviction.

(5) A majority of the court is of the opinion that the allegations of the pleading are insufficient to make out a case of corrupt lobbying except as to the Kentucky Jockey Club alone. But Judges RICHARDSON, THOMAS, and WILLIS are of the opinion that the allegation in connection with the other allegations of the petition are sufficient to withstand a demurrer.

(6) All of the judges are agreed that the allegations of the petition are not sufficient to show any corrupt or unlawful practice respecting the issuance of stock on credit, or the manner of advertising adopted and certain other allegations mentioned in the opinion. But, apart from these matters, Judges RICHARDSON, THOMAS, and WILLIS are of the opinion that the petition on the whole states a cause of action which, if established, would entitle the commonwealth to relief.

(7) The majority of the court is of the opinion that a proceeding in the matter of a quo warranto is a civil action authorized by the Civil Code of Practice, § 480, and Kentucky Statutes, § 569. Judges CLAY and DIETZMAN are of the opinion that, whatever the nature of the action, it is penal in so far as it seeks to recover a substantial sum of money, and embraced by section 1138 of the Kentucky Statutes, which provides a limitation of one year on penal prosecutions.

(8) A majority of the court is of the opinion that no substantial fine may be imposed in a quo warranto proceeding to forfeit the charters of corporations. Judges CLAY and DIETZMAN are of the opinion that no fine

may be imposed, whilst Chief Justice LOGAN and Judge REES are of the opinion that only a nominal fine may be imposed. Judges RICHARDSON, THOMAS, and WILLIS are of the opinion that a judgment in quo warranto rests in the sound discretion of the court, and that a substantial fine may be included therein, although the action is purely civil, and the fact that a substantial fine may be included in the relief granted does not convert the character of the action so as to bring section 1138 of the Kentucky Statute into operation on the remedy.

(9) All of the judges agree that a case can not be reversed for the imposition of only a nominal fine.

The judgment is affirmed.

Whole court sitting.

JUL 6 - 1972
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-1618

WILLIAM "BILL" OTTO PETITIONER

VS.

SAMUEL DOSOFSKY AND
ROBERT A. STITH RESPONDENTS

AMENDED STATEMENT OF JURISDICTION

Appended hereto, and incorporated herein, is a copy of the Kentucky Court of Appeal's Order denying Petitioner's Petition for rehearing. Petitioner's Petition for a Writ of Certiorari to the Kentucky Court of Appeals, and the previous amendment thereto, is readopted as if set out in full herein.

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I hereby certify that copies of this Amended Statement of Jurisdiction were mailed to the following attorneys for the parties this 30th day of June, 1972:

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COURT OF APPEALS OF KENTUCKY

MARCH 17, 1972
DATE

STYLE: OTTO v. KOSOFSKY, et al.

COUNTY: CAMPBELL

ORIGINAL OPINION - JUDGE: VANCE

PETITION FOR REHEARING - JUDGE: OSBORNE

APPELLANT's Petition for Rehearing Overruled.

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SEP 1 1972

MICHAEL RODAK, JR.,CLER

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1618

WILLIAM "BILL" OTTO,
Petitioner,

v.

SAMUEL KOSOFSKY and ROBERT A. STITH,
Respondents.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS OF KENTUCKY

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1618

WILLIAM "BILL" OTTO,
Petitioner,
v.
SAMUEL KOSOFSKY and ROBERT A. STITH,
Respondents.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS OF KENTUCKY

JURISDICTION

Petitioner asserts jurisdiction on authority of 28 USC § 1257 (3) and United States Constitution Article XIV. As there are but seven Articles to the Constitution respondent assumes that petitioner intended to cite Amendment XIV.

The application for writ of certiorari is a reargument of his contention in the Circuit Court, on appeal to Court of Appeals and on his petition for rehearing. He mistakenly asserts that the Fourteenth Amendment assures uniformity in decisions of the Court of Appeals of Kentucky and affords immunity from judicial error. The cases he cites, *Beck* v. *Washington*, 369 US 541, 8 L. ed. 2d 98, 82 S. Ct. 955; *Worchester County Co.* v. *Riley*, 302 US 292, 82 L. ed. 268, 58 S. Ct. 185; *Milwaukee Elec. Ry. Co.* v. *Milwaukee*, 252 US 100, 64 L. ed. 476, 40 S. Ct. 306; and *Davis* v. *Behagen* (S.D.N.Y.), 321 F. Supp. 1216, refute this contention.

The burden of petitioner's argument is that as the Court of Appeals has written an opinion which he considers to be not in harmony with a former opinion in *Commonwealth* v. *Kentucky Jockey Club,* 238 Ky. 739, 38 S.W. 2d 937, he has in some manner been denied equal protection of the law.

In *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill* (1930), 281 US 673, 74 L. ed. 1107, 50 S. Ct. 451, it is written:

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court."

Such is the case at bar and jurisdiction under the Amendment or otherwise is lacking.

Petitioner intimates at p. 20 of his petition that he should be permitted to operate a lottery called Bingo because *Jockey Club* permits a lottery at licensed race tracks. A similar argument was presented and rejected in *Erlanger Kennel Club* v. *Daugherty, Atty. Gen.* (1926), 213 Ky. 648, 281 S.W. 826.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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DATED: September 4, 1972